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Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State's suit to obtain from the federal government specific information and materials, for the purposes of determining whether federal officers or any other individuals have violated state criminal law, is governed by the deferential standard of review contained in the Administrative Procedure Act.

2. Whether the federal government's blanket assertion of a "law enforcement privilege" is sufficient to defeat a State's request for the materials as part of its own law enforcement efforts.

PARTIES TO THE PROCEEDINGS

The petitioner is the Commonwealth of Puerto Rico.

The respondents are the United States of America; Michael Mukasey, Attorney General; Robert Mueller, Director of the Federal Bureau of Investigation; Rosa Emilia Rodríguez-Vélez, United States Attorney for the District of Puerto Rico; and Luis S. Fraticelli, Special Agent in Charge of the Federal Bureau of Investigation in Puerto Rico.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	14
I. The States' Control Over Their Criminal Laws Requires Clarification	14
II. The Availability Of Judicial Review Not Subject To APA Deference Requires Clarification	21
A. The Courts of Appeals are divided over whether the APA's deferential standard of review governs suits such as this one	21
B. The deference entailed in APA § 706(2)(A) is entirely inappropriate in a case involving a sovereign's control of its criminal law	26

TABLE OF CONTENTS – Continued

Page

III. The Scope And Application Of The Law Enforcement Privilege Requires Clarification 31

A. The Courts of Appeals disagree as to the scope of the law enforcement privilege, and are not clear as to its application here 31

B. The First Circuit erred in its broad, categorical application of the law enforcement privilege 34

CONCLUSION 38

APPENDIX A, Opinion of the U.S. Court of Appeals for the First Circuit, issued on June 15, 2007 ..... App. 1

APPENDIX B, Opinion and Order of the U.S. District Court for the District of Puerto Rico, issued on September 26, 2006 ..... App. 52

APPENDIX C, Order of the U.S. Court of Appeals for the First Circuit denying Petition for Rehearing and Suggestion for Rehearing *En Banc*, issued on August 29, 2007 ..... App. 94

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alden v. Maine, 527 U.S. 706 (1999) 19

Arizona v. Manypenny, 451 U.S. 232 (1981) 15, 27

Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc., 502 U.S. 32 (1991) 28, 29, 30

Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977) 33

Brecht v. Abrahamson, 507 U.S. 619 (1993) 15

Chevron U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1984) 29

City of Jackson v. Jackson, 235 F. Supp. 2d 532 (S.D. Miss. 2002) 16

City of New York v. Beretta U.S.A. Corp., 222 F.R.D. 51 (E.D.N.Y. 2004) 37

Commonwealth of Puerto Rico v. United States, 490 F.3d 50 (1st Cir. 2007) 1

COMSAT Corp. v. National Science Found., 190 F.3d 269 (4th Cir. 1999) 21, 23, 26, 27

Cunningham v. Neagle, 135 U.S. 1 (1890) 16

Engle v. Isaac, 456 U.S. 107 (1982) 15

Escobedo v. Illinois, 378 U.S. 478 (1964) 17

Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774 (9th Cir. 1994) 21, 22, 23, 24, 26

TABLE OF AUTHORITIES – Continued

Page

Flowers v. Warden, 677 F. Supp. 1275 (D. Conn.), *rev'd on other grounds*, 853 F.2d 131 (2d Cir. 1988) 17

Heath v. Alabama, 474 U.S. 82 (1985) 4

Idaho v. Horiuchi, 253 F.3d 359 (9th Cir.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) 16

Imbler v. Pachtman, 424 U.S. 409 (1976) 17

In re Dep't. of Investig. of the City of New York, 856 F.2d 481 (2d Cir. 1988) 31, 33

In re Sealed Case, 856 F.2d 268 (D.C. Cir. 1988) 31

In re SEC ex rel. Glotzer, 374 F.3d 184 (2d Cir. 2004) 21, 24

In re U.S. Dep't of Homeland Sec., 459 F.3d 565 (5th Cir. 2006) 31, 33, 37

Leedom v. Kyne, 358 U.S. 184 (1958) 28

Linder v. Calero-Portocarrero, 251 F.3d 178 (D.C. Cir. 2001) 21, 22, 23, 24

Maryland v. Soper, 270 U.S. 36 (1926) 4, 17, 18, 36, 37

Massachusetts v. EPA, 127 S. Ct. 1438 (2007) 26

Mesa v. California, 489 U.S. 121 (1989) 4, 16

R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002) 28

Roviaro v. United States, 353 U.S. 53 (1957) 31, 32

Schiller v. City of New York, 244 F.R.D. 273 (S.D.N.Y. 2007) 37

TABLE OF AUTHORITIES – Continued

Page

Swanner v. United States, 406 F.2d 716 (5th Cir. 1969) 33

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 15

United States ex rel. Drury v. Lewis, 200 U.S. 1 (1906) 16

United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) 31

United States v. O'Neill, 619 F.2d 222 (3d Cir. 1980) 31, 34

Willingham v. Morgan, 395 U.S. 402 (1969) 16

FEDERAL CONSTITUTION AND STATUTES

U.S. Const. Amd. X 1

5 U.S.C. § 702 ..... 2, 21, 22, 23, 24

5 U.S.C. § 706(2)(A) ..... *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 1442(a) 16

Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198-99 15

Act of Mar. 3, 1817, ch. 109, §§ 2, 6, 3 Stat. 396, 397 16

Act of Mar. 2, 1833, ch. 57, §§ 2-3, 4 Stat. 632, 633-34 16

Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756-57 16

TABLE OF AUTHORITIES – Continued

Page

Act of May 11, 1866, ch. 80, §§ 3-4, 14 Stat. 46, 46 16

Act of Feb. 5, 1867, ch. 27, 14 Stat. 385 16

Act of Mar. 3, 1911, ch. 231, § 33, 36 Stat. 1087, 1097 16

STATE STATUTES

34 P.R. Laws Ann. § 1476 9

OTHER AUTHORITIES

The Federalist No. 51 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner the Commonwealth of Puerto Rico respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the First Circuit is reported at 490 F.3d 50 and is reprinted at App. 1-49. The opinion of the district court is unreported and is reprinted at App. 52-92.

JURISDICTION

The First Circuit issued its decision on June 15, 2007. The Commonwealth's timely petition for rehearing and suggestion of rehearing en banc was denied on August 29, 2007. App. 94. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The waiver of sovereign immunity contained in the Administrative Procedure Act (APA) provides, in pertinent part:

> A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

The APA also provides that a federal court called upon to review agency action shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

INTRODUCTION

This case presents fundamental questions about the sovereign power of the States and the Commonwealth of Puerto Rico to enforce their criminal laws. It involves two consolidated district court cases, each arising out of the issuance of a subpoena for Federal Bureau of Investigation (FBI) records by the Puerto

Rico Department of Justice (PRDOJ). The PRDOJ issued those subpoenas in an effort to investigate whether any individuals, be they private citizens or federal officers, violated Puerto Rico criminal law on two separate occasions. The first involved the shooting death of a Puerto Rico resident and the shooting of one or more federal officers during an FBI intervention. The second involved the pepper spraying of a group of protestors and journalists by federal officers. To determine whether Puerto Rico's criminal laws were violated during either of those incidents, the PRDOJ requested various materials and information from the FBI, including the names of the officers involved, physical items used by the officers at the events, and applicable FBI protocols and guidelines governing the events. The FBI has refused the vast majority of those requests. *See infra* n.3 (describing the limited exceptions to the FBI's general refusals).

Petitioner the Commonwealth of Puerto Rico thereafter initiated proceedings in federal court, seeking injunctions ordering the FBI to provide the requested materials and information. The district and circuit courts have declined to do so. The First Circuit concluded that the federal judiciary's only role in this context is to review the FBI's disclosure refusal under the Administrative Procedure Act's "arbitrary and capricious" standard, 5 U.S.C. § 706(2)(A), an extremely deferential form of review. Beyond that, the First Circuit upheld the FBI's across-the-board assertion of "law enforcement privilege" with respect to the requested materials and information, even though

the district court had not engaged in any *in camera* review of the materials. The First Circuit's treatment of these issues deepens two separate disagreements among the lower federal courts, regarding (1) the applicability of the APA's standard of review in contexts such as this, and (2) the scope and application of the law enforcement privilege.

The law in these areas is all the more uncertain – and the cost of uncertainty much greater – where, as here, the litigant adverse to the federal government is no private party but a sovereign in the federal system, seeking to investigate potential violations of its criminal laws. The "power to create and enforce a criminal code" is "[f]oremost among the prerogatives of sovereignty." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). That sovereign prerogative extends to the investigation and, where appropriate, prosecution of federal officers for violating state criminal law. *See, e.g., Mesa v. California* 489 U.S. 121 (1989) (affirming the remand to state court of misdemeanor-manslaughter charges against federal postal officers); *Maryland v. Soper*, 270 U.S. 36 (1926) (ordering the remand to state court of state criminal charges against federal prohibition officers). States cannot exercise that authority, however, if they cannot gather the information necessary to determine whether their criminal laws have been violated and, if so, whether a prosecution is warranted.

The decision below effectively precludes States from doing just that. The result is uncertainty about the extent to which the States retain control over the

administration of their criminal laws, as well as a severe chilling of the States' willingness and ability to provide the check on federal power that the Founders envisaged. *See The Federalist No. 51* (James Madison) (explaining that the Constitution is structured so that "[t]he different governments will control each other," the better to "secur[e] . . . the rights of the people"). The Court should grant certiorari to clarify the existence and scope of this critical facet of state sovereignty.

STATEMENT OF THE CASE

A. Factual Background

This case involves two separate cases, consolidated on appeal. Each arises out of the PRDOJ's issuance of a subpoena for materials and information held by the FBI. We will discuss the facts of each case in turn.

1. *The Ojeda-Ríos Shooting*. On September 23, 2005, FBI agents converged on a residence near Hormigueros, Puerto Rico in an attempt to apprehend Filiberto Ojeda-Ríos. App. 56. Ojeda-Ríos was one of the founders of the Macheteros, an organization that supports the pursuit of Puerto Rican independence by various means, including armed struggle. App. 3. In 1990, while awaiting trial on robbery charges in Connecticut, Ojeda-Ríos cut off his electronic monitoring device and absconded. App. 56. He thereby became a federal fugitive.

In September 2005, having determined Ojeda-Ríos's whereabouts in Puerto Rico, the FBI set in motion plans to apprehend him. On the afternoon of September 23, 2005, a team of FBI agents converged on the Hormigueros residence, where they believed Ojeda-Ríos to be hiding. A gunfight ensued.

A subsequent report by the Office of the Inspector General in the U.S. Department of Justice (OIG) determined that the gunfight lasted about two minutes, that Ojeda-Ríos fired 19 rounds, and that at least eight different FBI agents fired approximately 104 rounds. *See Office of the Inspector General, U.S. Department of Justice, A Review of the September 2005 Shooting Incident Involving the Federal Bureau of Investigation and Filiberto Ojeda Ríos: Executive Summary* 15, 27 (Aug. 2006), *available at* http://www.usdoj.gov/special/s0608/exec.pdf (hereinafter OIG Report). The OIG concluded that "the FBI fired three shots through the front door of the residence that may have violated the [FBI's] Deadly Force Policy." *Id.* at 28. Although the OIG stated that none of those shots struck Ojeda-Ríos or his spouse (who was in the residence during the gunfight and fled shortly thereafter),[1] it also noted that its own investigation was limited by the fact that "the agents who we believe

[1] The federal government initially took Ojeda-Ríos's spouse into custody, but then released her without pursuing any charges. The Commonwealth of Puerto Rico's investigation encompasses any possible criminal conduct by anyone involved in the incident, including Ojeda-Ríos's spouse.

may have fired these shots declined to provide voluntary follow-up interviews to the OIG." *Ibid.*

The OIG stated that Ojeda-Ríos remained in the residence after the shooting ended, and that he responded to the entreaties of an FBI negotiator outside the residence by saying that he wanted to talk to a particular local news journalist. *Id.* at 17. According to the OIG, Ojeda-Ríos held out the possibility of his surrender if he was allowed to speak with the journalist. *Ibid.* ("At some point, Ojeda responded, 'I am not going to negotiate with any of you until you bring the journalist Jesus Dávila. Then we can talk about my surrender.'"). The dialog ended at that point.

The OIG determined that the shot that killed Ojeda-Ríos was fired at approximately 6:08 p.m., over 90 minutes after the initial exchange of gunfire had ended. *Id.* at 16, 18. The OIG concluded that the fatal shot was fired by an FBI sniper positioned outside the house, with a view through the kitchen window. *Id.* at 18. The sniper reportedly told the OIG that he saw a person open a refrigerator inside the house and then crouch down, holding a gun in his left hand. *Ibid.* The sniper then apparently fired three rounds in quick succession, one of which hit Ojeda-Ríos. *Id.* at 18, 24. The sniper reportedly told his FBI colleagues over the radio that he thought he hit his target. *Id.* at 20.

In the early evening of September 23, the United States Attorney's Office in Puerto Rico informed the PRDOJ that Ojeda-Ríos was likely dead or injured as

a result of a gunshot, and requested PRDOJ to send local prosecutors to the Hormigueros residence. *Id.* at 21. Once local officials arrived at the scene, however, FBI agents prevented them from entering the residence. Moreover, although the OIG later found that no sounds or movements were detected in the residence following the sniper's shots, *id.* at 20, the FBI did not enter the residence until the following afternoon, *id.* at 22. Upon entering, they found Ojeda-Ríos lying dead on the floor. *Ibid.*

The Puerto Rico Institute of Forensic Sciences subsequently performed an autopsy. According to the OIG, the doctor in charge of the autopsy estimated that Ojeda-Ríos "expired from loss of blood approximately 15 to 30 minutes after being shot." *Id.* at 24. The OIG also noted that the doctor "opined that Ojeda could have survived the wound if he had received immediate first aid and surgical care." *Ibid.*

Although the OIG Report ultimately "did not conclude that any of the actions of FBI officials constituted misconduct," *id.* at 42, it did "identifly] a number of deficiencies in the FBI's conduct of the Ojeda surveillance and arrest operation," *id.* at 39. The OIG found that "several of [the responsible FBI officials'] decisions . . . reflected an inadequate assessment of the known circumstances, or were either contrary to or inconsistent with applicable FBI guidelines." *Id.* at 42.

Shortly after Ojeda-Ríos's death, the PRDOJ began a criminal investigation into the events leading

up to it. On October 4, 2005, the PRDOJ issued a subpoena directing the United States Attorney in Puerto Rico to produce certain materials and information pertinent to its investigation.[2] The requested materials and information included (1) a copy of the FBI's "Operation Order" governing the Hormigueros intervention; (2) the name, rank, and other identifying information of each federal officer who participated in or made decisions regarding the intervention; (3) various equipment used by the federal officers involved, including weapons; (4) any inventory of the Hormigueros property; (5) copies of any expert reports relating to the intervention or to Ojeda-Ríos's death; (6) copies of any photographs or recordings of the intervention; and (7) copies of any relevant FBI protocols, including those related to violent interventions and the use of deadly force. App. 4.

The FBI refused to allow the PRDOJ access to the vast majority of the requested materials.[3] Of

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[2] The subpoena was issued pursuant to section 1 of the Commonwealth of Puerto Rico's Act No. 3 of March 18, 1954, 34 P.R. Laws Ann. § 1476, which provides:

> Any person summoned as a witness by any prosecuting attorney or magistrate shall be bound to appear and testify or produce books, records, correspondence, documents, or other evidence required of him in any criminal investigation, proceeding, or process.

[3] The only exceptions were the bulletproof vests, helmets, weapons, and vehicles used in the intervention, as well as photographs taken before, during, and after the intervention. The FBI stated that it would grant the PRDOJ limited inspection of those materials but that the FBI would maintain custody

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particular significance, the FBI refused to provide any information about the FBI agents involved in Ojeda-Ríos's death (who are, along with Ojeda-Ríos's spouse, the only living witnesses of the event) or the protocols and orders governing the intervention. The Commonwealth of Puerto Rico ultimately filed suit in federal district court to compel disclosure of the requested materials and information.

2. *The Events at 444 de Diego.* Using information obtained during the intervention at the Hormigueros property, the FBI obtained a search warrant for a residence at 444 de Diego in San Juan. App. 5. The FBI executed the warrant in February 2006. While the search was proceeding, a crowd of protestors, journalists, and members of the general public gathered outside the residence. *Ibid.* A number of journalists in the crowd later filed formal complaints with the PRDOJ, alleging that federal agents injured them while they were covering the search. They provided photographs and a video that they had taken of two FBI agents who, the journalists alleged, had used pepper spray against them.

To investigate whether there had been any criminal wrongdoing during the incident, the PRDOJ again issued subpoenas directing the United States Attorney and the FBI special agent in charge of the Puerto Rico field office to produce three categories of

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of them at all times, and that an FBI official would be present throughout the inspection. App. 4-5.

materials and information: (1) the name, rank, and other identifying information of the two FBI agents who allegedly used pepper spray during the incident; (2) official photographs of those two agents; and (3) copies of any relevant FBI protocols governing the use of force and pepper spray.

The FBI moved to quash the subpoenas in federal district court. After holding a hearing on the motion, the district court issued an order declining to quash the subpoenas but also not dismissing the motion to quash. The Commonwealth of Puerto Rico thereafter filed suit in federal district court to compel disclosure of the requested materials.

B. Proceedings Below

The above-mentioned suits invoked the district court's federal question jurisdiction (*see* 28 U.S.C. § 1331) and asserted five different causes of action. Most pertinently here, they asserted a nonstatutory cause of action to vindicate the Commonwealth's sovereign authority to enforce its criminal laws. App. 7. In the alternative, the complaints asserted that, to the extent the complaints had to be evaluated under the APA, the FBI's refusal to produce the requested materials was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706(2)(A). *Ibid.* As for relief, the Commonwealth sought a declaration that the federal defendants' refusal to produce the requested materials and information constituted an unconstitutional impairment of the Commonwealth's

sovereign authority, as well as an injunction ordering the defendants to produce the subpoenaed information. App. 6-7.

The district court consolidated the cases, and the federal government moved to dismiss. App. 62-63. The court determined that the Commonwealth's sovereign authority to enforce its criminal laws did not support a nonstatutory cause of action to obtain the requested materials. App. 81. Accordingly, the court dismissed the nonstatutory components of the two suits. The court also granted summary judgment for the federal government on the Commonwealth's APA claims. App. 91. It concluded that the FBI's refusal to comply with the Ojeda-Ríos subpoenas was neither arbitrary nor capricious. With respect to the 444 de Diego subpoenas, the court decided that there had been no final agency action and thus that the FBI's refusal to comply with the subpoenas was not subject to judicial review. App. 85.

The First Circuit affirmed. App. 1-49. The court first determined that federal sovereign immunity did not pose an obstacle to the Commonwealth's nonstatutory cause of action, reasoning that Congress had waived that immunity for purposes of suits like these. But it concluded that such an action was nonetheless unavailable because the APA provided "a means of vindicating [the Commonwealth's] right[]" to enforce its criminal laws, and because "the existence of the APA as a means for reviewing the FBI's actions at least implies that nonstatutory review is inappropriate." App. 16-17. In short, the court concluded that

"when a state's interest in investigating the agents of a federal law enforcement entity arguably conflicts with that federal entity's need to protect certain information relating to law enforcement activities, Congress has provided a mechanism – the APA – for resolving these conflicts." App. 17.

Applying the APA, the First Circuit concluded that the FBI's refusal to produce the requested materials was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." App. 18 (quoting 5 U.S.C. § 706(2)(A)). The court found that the federal government was entitled to assert what it termed a "qualified" law enforcement privilege against having to disclose information about "law enforcement techniques and procedures." App. 26. And although it suggested that this privilege is "subject to balancing the federal government's interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party's interest in disclosure," App. 26-27, the court ultimately upheld the federal government's assertion of privilege across the board. App. 43. Thus, the privilege was upheld without any judge, district or circuit, actually engaging in any *in camera* inspection of the materials in question, much less any concrete and particularized weighing of the interests for and against disclosure of the discrete items and information in question.

In reaching its conclusion, the First Circuit professed an awareness of the Commonwealth's argument that "the FBI's decision to withhold the

[requested] information raises the possibility that a federal agency may thwart state criminal proceedings against one of its own employees." App. 37-38. Noting that federal officers are not immune from state prosecution except for actions taken "within the scope of official duties," the court stated that it was "troubl[ed]" by the prospect of thwarting legitimate state investigations and prosecutions in this manner. App. 38. But it concluded that those worries were unfounded in this case. In so holding, the court relied in part on the fact that, with respect to the Ojeda-Ríos shooting, the federal OIG Report "did not conclude that any of the actions of FBI officials constituted misconduct." App. 38-39 (quoting OIG Report at 42). In other words, the court saw the OIG Report as an adequate though "imperfect substitute" for the Commonwealth's own independent and informed judgment about whether its criminal laws had been violated. App. 39. Accordingly, the court saw no arbitrariness in subordinating the Commonwealth's control over its laws to the FBI's blanket assertions of privilege.

REASONS FOR GRANTING THE PETITION

I. States' Control over Their Criminal Laws Requires Clarification.

The decision below raises two discrete questions meriting this Court's plenary review. We discuss them below in Parts II and III, *infra*. Both questions,

however, implicate the same basic issue that is at the heart of this case, and that itself provides a compelling reason for granting the petition. Put simply, that issue is whether States retain the sovereign authority to determine for themselves whether their criminal laws have been violated and, if so, whether to prosecute those responsible.

The Framers of the Constitution "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), such that "[t]he States," not the federal government, "possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). In recognition of that preeminence, this Court has implemented "a strong judicial policy against federal interference with state criminal proceedings." *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981) (citations and internal quotation marks omitted). Historically, that policy of federal non-interference has applied even where, as here, the potential suspects or defendants include federal employees.

Ever since the Founding, States have retained substantial authority to prosecute federal officers for violating state criminal law. Congress has long recognized that authority. Starting as early as 1815, it from time to time enacted measures providing for the removal to federal court of certain state prosecutions (and civil suits) against certain federal officers. *See, e.g.*, Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198-99;

Act of Mar. 3, 1817, ch. 109, §§ 2, 6, 3 Stat. 396, 397; Act of Mar. 2, 1833, ch. 57, §§ 2-3, 4 Stat. 632, 633-34; Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756-57, *amended by* Act of May 11, 1866, ch. 80, §§ 3-4, 14 Stat. 46, *and* Act of Feb. 5, 1867, ch. 27, 14 Stat. 385; Act of Mar. 3, 1911, ch. 231, § 33, 36 Stat. 1087, 1097. Congress ultimately included a removal provision covering all federal officers in the Judicial Code of 1948, *see Willingham v. Morgan*, 395 U.S. 402, 406 (1969), and a version of that provision remains in effect today, *see* 28 U.S.C. § 1442(a). The very existence of these removal provisions confirms the power of the States to bring criminal actions against federal officers.[4]

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[4] Removal is not available in all state prosecutions of federal officers; the defendant must raise a colorable federal defense to qualify. *Mesa v. California*, 489 U.S. 121, 139 (1989). That allegation may also create the basis for defeating the underlying charges, *see Cunningham v. Neagle*, 135 U.S. 1, 75 (1890), though such a defense certainly does not exist in all cases. *See United States ex rel. Drury v. Lewis*, 200 U.S. 1, 7 (1906) ("The general jurisdiction, in time of peace, of the civil courts of a state over persons in the military service of the United States, who are accused of a capital crime or of any offence against the person of a citizen, committed within the state, is, of course, not denied."); *Idaho v. Horiuchi*, 253 F.3d 359, 366 (9th Cir.) (en banc) (Kozinski, J.) ("[A] state may prosecute federal agents if they have acted unlawfully in carrying out their duties."), *vacated as moot*, 266 F.3d 979 (2001); *City of Jackson v. Jackson*, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) ("Supremacy Clause immunity is not absolute. . . . [A] state may prosecute federal agents if they have acted unlawfully in carrying out their duties."). But whatever the contours of the officer's defenses, the critical point for present

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The authority to prosecute naturally entails the authority to investigate. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 & n.33 (1976) (recognizing "aspects of the prosecutor's responsibility that cast him in the role of an . . . investigative officer," and noting that "[p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence"); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (affirming "the powers of the police to investigate an unsolved crime . . . by gathering information from witnesses and by other proper investigative methods") (internal citations and quotation marks omitted); *Flowers v. Warden*, 677 F. Supp. 1275, 1280 (D. Conn.) ("Pursuant to its police powers, the state investigates, prosecutes, tries and punishes criminal misconduct."), *rev'd on other grounds*, 853 F.2d 131 (2d Cir. 1988). The fact that the subjects of the investigation are federal officers does not displace this basic principle. Thus in *Maryland v. Soper*, 270 U.S. 36 (1926), a case involving the state prosecution of federal prohibition officers for homicide and for obstruction of justice and perjury, the Court stressed that without regard to whether the officers might be able to raise a federal defense against any of the charges, the State had the authority, in the first instance, to investigate whether any of its laws had been broken. "The right of the

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purposes is that States have always retained the basic authority to decide in the first place whether to pursue criminal charges against federal officers.

state to inquire into suspected crime in its territory," the Court explained, "justifies the use of investigation by its officers and the questioning of suspected persons under oath," including of the "federal officers under suspicion." *Id.* at 42. This is a matter of "right"; it is not merely at the sufferance of the federal authorities. *Ibid.* Put simply, a State's sovereign control of its laws includes the right to question federal suspects and to otherwise investigate potential violations of its laws.

The decision below threatens to undo this dimension of our federalism. At every turn, the Commonwealth of Puerto Rico has been denied access to the information it needs to determine whether any of its laws were violated during either of the incidents in question, and by whom. In the case of the Ojeda-Ríos shooting, the First Circuit acknowledged that allowing the FBI to withhold the information in question "raise[d] the possibility that a federal agency may thwart state criminal proceedings against one of its own employees." App. 37-38. But it deemed those concerns adequately answered by the fact that the OIG Report – a report commissioned and produced by an office within the very federal agency whose employees were responsible for the shooting – "did not conclude that any of the actions of FBI officials constituted misconduct." App. 38-39 (quoting OIG Report at 42). The OIG Report provided no such adequate answers, however. First, the OIG did not reach an affirmative finding that the officers involved committed no misconduct during the Ojeda-Ríos incident; it

simply "did not conclude" that there had been misconduct. Second, by the OIG's own admission, its investigation was hampered by its need to rely on the voluntary cooperation of the FBI officers involved. On certain key issues the officers simply "declined" the OIG's request for follow-up statements or other clarifications, leaving the OIG with unanswered questions. OIG Report at 25, 28. Third, even with the limitations just mentioned, the OIG "identified a number of deficiencies in the FBI's conduct of the Ojeda surveillance and arrest operation," *id.* at 39, including "inadequate assessment of the known circumstances" and violation of "or inconsisten[cy] with applicable FBI guidelines," *id.* at 42. At the very least, then, the OIG Report confirms that the events leading up to and during the Ojeda-Ríos shooting provide substantial cause for concern. Given that, the First Circuit's willingness to displace the Commonwealth's own sovereign authority to investigate possible violations of its laws is especially worrisome.

Indeed, whatever the quality of the OIG Report's findings, the critical point is that no federal entity – agency, office, or court – has the authority to dictate to a State what to conclude with respect to potential violations of its laws. *Cf. Alden v. Maine*, 527 U.S. 706, 715 (1999) (States "are not relegated to the role of mere provinces or political corporations"). The power to investigate possible violations and to bring charges where appropriate belongs to the State alone. The decision below flies in the face of this basic principle of state sovereignty, casting the principle

itself in doubt. This Court's review is necessary to confirm States' continued, meaningful authority over their criminal laws.

To be clear, the Commonwealth does not come before this Court having already determined to file criminal charges (against a federal officer or anyone else) in connection with either of the underlying events at issue here. Nor does the Commonwealth deny that, if it were to pursue criminal charges against any federal officers in these matters, the officers could potentially assert immunity to the extent that they were acting within the bounds of their lawful federal authority. It is far too soon to know whether any such assertion might prevail, and that very uncertainty illustrates what is at stake in this case. Fundamentally, this case is about: the Commonwealth's – indeed, any State's[5] – authority to gather evidence regarding events of concern within its jurisdiction precisely so that it can determine whether its laws have been violated, who might be responsible for the violations, what if any defenses or

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[5] The First Circuit's decision does not draw any distinction between the sovereign authority of the Commonwealth of Puerto Rico and the authority of any State of the Union. Moreover, the United States has conceded that, for purposes of the issues presented in this case, the Commonwealth stands on the same footing as any State. *See* Ct. App. Appendix at 249, 274 ("The governmental status of the Commonwealth is immaterial."); *id.* at 245, 266 ("The Commonwealth of Puerto Rico attempts to assert rights which no sovereign, whether state or foreign nation, may properly assert. . . .").

immunities they might be able to assert, and, finally, what if any criminal charges are appropriate. Denying the States that authority nullifies a critical component of their sovereignty.

II. The Availability of Judicial Review Not Subject to APA Deference Requires Clarification.

A. The Courts of Appeals are Divided Over Whether the APA's Deferential Standard of Review Governs Suits Such as This One.

In concluding that the Commonwealth's suit is subject to the APA's deferential standard of review, the First Circuit deepened a disagreement among the courts of appeals. The Court should grant certiorari to resolve the disagreement.

The APA waives the federal government's sovereign immunity from federal court "action[s] seeking relief other than money damages" on account of a federal agency's or employee's alleged unlawful conduct. 5 U.S.C. § 702. The courts of appeals (including the First Circuit below, *see* App. 11) are in general agreement that this waiver covers attempts to compel agency compliance with subpoenas. *See, e.g.*, *In re SEC ex rel. Glotzer*, 374 F.3d 184, 189-90 (2d Cir. 2004); *COMSAT Corp. v. National Science Found.*, 190 F.3d 269, 274 (4th Cir. 1999); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 n.9 (9th Cir. 1994); *Linder v. Calero-Portocarrero*, 251 F.3d 178,

181 (D.C. Cir. 2001).[6] They are divided, however, on the question whether and in what circumstances such "action[s]" are subject to the deferential review imposed by 5 U.S.C. § 706(2)(A).

Some courts, including the Ninth and D.C. Circuits, do not confine suits of this sort to review under APA § 706(2)(A). *See Exxon*, 34 F.3d 774; *Linder*, 251 F.3d 178. In *Exxon*, a suit to compel a number of federal agencies to comply with discovery requests relating to a separate civil action between private parties, the Ninth Circuit held that although the agencies' initial refusals constituted the kind of agency action *eligible* for review under APA § 706(2)(A), the plaintiffs were not *confined* to such review. *See* 34 F.3d at 780 n.11. A suit seeking APA review was possible but not required. Requiring APA review, the court observed, could be "inconvenient to litigants" and might "effectively eviscerate any right to the requested testimony." *Ibid.* (internal quotation marks and alterations omitted). Thus the court found no bar to the exercise of what amounted to nonstatutory

[6] In each of the cases just cited, the plaintiff's subpoena or other request for information was made in order to advance its position in a separate judicial or arbitral proceeding. No such separate action has yet been filed here; the Commonwealth first needs access to the information in question in order to determine whether its laws have been broken and whether any charges should be filed. But none of the cases hold that § 702's waiver of sovereign immunity covers only circumstances where a separate action is pending, nor is there any reason to confine it in that way.

review of the plaintiff's claims. In that posture, the claims were to be resolved according to the ordinary rules governing discovery requests, including any privileges the government might assert. *See id.* at 780. The deference to federal agency decisions entailed in APA-style review was not warranted.

Similarly in *Linder*, an action to enforce subpoenas served on various federal agencies in connection with a separate case to which the government was not a party, the D.C. Circuit emphasized that it had "never read the waiver contained in APA § 702 to be limited by APA § 706." 251 F.3d at 181. Noting that "[n]othing in the language of § 702 indicates that it applies only to actions under § 706," the court instead applied "the ordinary standard of review to determine whether a district court properly considered the motion to compel production." *Ibid.* As in *Exxon*, then, the court resolved the issue before it without granting the federal government the deference ordinarily called for by the APA.

In stark conflict with the Ninth and D.C. Circuits, the Fourth Circuit treats APA § 706's deferential standard as a "limitation upon th[e] waiver" of sovereign immunity contained in § 702. *COMSAT*, 190 F.3d at 277. Thus, the court in *COMSAT* held that where a federal agency is subpoenaed in connection with an arbitration to which the government is not a party, a suit against the agency to enforce the subpoena must be governed by § 706. *Id.* at 271, 277. In the court's view, "[w]hen an agency is not a party to an action, its choice of whether or not to comply

with a third-party subpoena is essentially a policy decision about the best use of the agency's resources." *Id.* at 278. Applying § 706, the court determined that a reviewing court may set aside such a decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 274.

The Fourth Circuit adopted its approach "in full recognition" that it is irreconcilable with the Ninth Circuit's *Exxon* decision, stating simply that it "decline[d] to follow th[at] holding." *Id.* at 277. The D.C. Circuit's later decision in *Linder* explicitly confirmed and further entrenched the split. *See* 251 F.3d at 180 (discussing the conflict between the Fourth and Ninth Circuits and aligning itself with the latter). More recently, the Second Circuit has recognized the disagreement but has declined to take a position on the issue. *See In re SEC ex rel. Glotzer*, 374 F.3d at 190-91 (citing *Exxon* and *Linder* and recognizing that "some of our sister circuits have affirmatively held that APA § 706 does not apply to motions to compel agency compliance with subpoenas," but adhering to an earlier decision declining to take a position on the issue). In short, the disagreement among the circuits on this issue is well-recognized, sharp, and mature.

The decision of the First Circuit in this case only adds to the inconsistency among the circuits. Although it concluded that the Commonwealth's suit was subject to APA § 706(2)(A), it did so for reasons other than those relied upon by the Fourth Circuit. Rather than treating APA § 702's waiver as categorically limited to review under § 706, the First Circuit

held that § 706(2)(A) applied unless the Commonwealth could satisfy what it described as a two-part test for entitlement to nonstatutory review. App. 15. As it articulated that test, nonstatutory review is available (1) "only if its absence would wholly deprive the party of a meaningful and adequate means of vindicating its rights," and (2) only so long as "Congress . . . ha[s] [not] clearly intended to preclude review of the agency's particular determination." *Ibid.* (internal quotation marks and citations omitted). As we discuss below, the First Circuit's application of the two-part test was based upon a misreading of this Court's precedents. But whatever its merits, the First Circuit's analysis compounded an already entrenched disagreement among the circuits, creating what amounts to a three-way split over how to address the issue.

There is, in short, pervasive disagreement among the courts of appeals about how to treat a federal suit to compel agency compliance with subpoenas or other informational requests relating to separate proceedings or investigations. The disagreement is of substantial consequence in this case. Under the approach adopted by the Ninth and D.C. Circuits, the Commonwealth would not have to overcome the heavy deference to federal agency decision making that APA § 706(2)(A) entails. In contrast, the First Circuit's approach (and the Fourth Circuit's, which is even more extreme) effectively treats the relevant federal agency – here, the FBI – as the principal decision maker. As we discuss in the next section, that treatment is

fundamentally at odds with state sovereign control over state criminal law. The point here, though, is that it is an approach in irreconcilable tension with that of the Ninth and D.C. Circuits. The Court should grant the petition to relieve that tension by clarifying the law in this area.

B. The Deference Entailed in APA § 706(2)(A) Is Entirely Inappropriate in a Case Involving a Sovereign's Control of Its Criminal Law.

As the Ninth Circuit recognized in *Exxon*, applying the APA's standards to a suit to compel federal compliance with a subpoena or other informational request risks imposing undue burdens on the party seeking the information, and might even "effectively eviscerate any right" to the information itself. 34 F.3d at 780 n.11 (internal quotation marks and alterations omitted). That risk is all the more grave when the party seeking the information is a sovereign in the federal system, and when it needs the information in order to decide whether and how to administer its criminal laws. *Cf. Massachusetts v. EPA*, 127 S. Ct. 1438, 1454 (2007) ("States are not normal litigants for the purposes of invoking federal jurisdiction.").

The Fourth Circuit's opinion in *COMSAT* illustrates the problem. That case involved a private plaintiff attempting to obtain information from the federal government in order to improve its position in a separate proceeding against another private entity.

Describing the case as pitting a private litigant's interests against the "public" interests of the federal agency, the court determined that "the decision to permit employee testimony is committed to the agency's discretion." 190 F.3d at 278. "[A] third party subpoena will [not]," the court insisted, "provide the private litigant with guaranteed access, at public expense, to the testimonial evidence of agency employees." *Ibid.*

However accurate an appraisal of the competing interests in that case, the Fourth Circuit's description does not capture the values at stake in a suit by a State to enforce its sovereign control of its criminal laws. Cases like this one do not involve private litigants attempting to deploy public resources to their advantage in a private dispute; they involve a sovereign seeking the information it needs to exercise its exclusive authority to decide whether and how to enforce its criminal laws. To commit the information disclosure decision to a federal agency's discretion would be to say that the agency – here, the FBI – can decide whether a State may enforce its criminal laws. It would entail an abandonment of the "strong judicial policy against federal interference with state criminal proceedings." *Manypenny*, 451 U.S. at 243.

The same problem plagues the First Circuit's application of the two-part test it identified for the availability of nonstatutory review. As an initial matter, it is far from clear that the test should govern cases like this at all. This Court's cases on nonstatutory review are concerned principally with determining whether

judicial review should be available in the absence of final agency action, and thus in an earlier posture than the law would ordinarily allow. *See, e.g., Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 44 (1991) (denying nonstatutory review in part on the ground that "Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceedings"); *see also R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 42 (1st Cir. 2002) (describing the Court's nonstatutory review cases, including *Leedom v. Kyne*, 358 U.S. 184 (1958), as recognizing "a narrow exception to the general rule of exhaustion for review of administrative action"). But everyone concedes that final agency action is present in at least one of the two underlying cases at issue here (the one involving the FBI's refusal to disclose information relating to the Ojeda-Ríos shooting).[7] The FBI's refusal to comply with the PRDOJ's subpoenas is final; there are no other avenues of potential administrative relief. By its terms, therefore, the two-part test employed by the First Circuit should not apply here.

Even if the two-part test does extend to this case, the First Circuit's application of it seriously misconceives the interests at stake. The first part of the test

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[7] The Commonwealth maintains that the FBI's refusal to disclose information relating to the 444 de Diego incident, followed by the filing of a motion to quash the subpoena requesting information relating to the incident, also entailed the requisite final agency action.

asks whether precluding nonstatutory review would deny the plaintiff of a "meaningful and adequate opportunity for judicial review." *MCorp*, 502 U.S. at 43. The First Circuit answered that question in the negative on the ground that APA § 706(2)(A) provides "a means of vindicating [the Commonwealth's] rights." App. 16. As already described, however, APA § 706(2)(A) applies in circumstances where the federal agency has principal policymaking authority. It is premised on the proposition that the agency is the institution with the greatest institutional expertise in the area and that such expertise justifies granting the agency broad discretion to balance competing interests as it sees fit. *See generally Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984). The First Circuit's analysis in this case rested on just such a premise: It substantially deferred to the FBI's refusal to produce the requested materials and information on the ground that the refusal was "essentially a policy decision about the best use of the agency's resources." App. 19 (internal quotation marks and citations omitted).

Such "agency deference" is entirely out of order in this context. First, as discussed in Part III, *infra*, resolving the disclosure issue in this case ultimately requires the construction and application of the judicially created doctrine of "law enforcement privilege." That privilege is a creature of judicial creation. Neither Congress nor the courts have delegated to any federal agency the primary authority to articulate or apply the privilege. Thus, judicial resolution of

the assertion of law enforcement privilege ought to entail de novo consideration. The deferential standard of review prescribed by the APA is entirely inappropriate in this context.

Second, agency deference is especially inappropriate in cases, like this one, implicating the investigation and possible prosecution of state criminal law violations. The State *alone* has the authority to decide whether, when, and against whom to enforce its criminal laws. In the context of judicial review of a State's attempts to obtain the information it needs to enforce its laws, any rule that would require deference to the nondisclosure decisions of a federal agency would "deprive [the State] of a meaningful and adequate means of vindicating" its control over its laws. *MCorp*, 502 U.S. at 43.

To be sure, as discussed below, the courts may be called upon to weigh a State's request for certain materials or information against the federal government's interest in nondisclosure as reflected in, for example, an assertion of law enforcement privilege. But that review must not be governed by APA § 706(2)(A), lest a federal agency be given primacy over both the federal courts (which are responsible for construing and applying the law enforcement privilege they have created) and the States (which must be granted preeminent oversight of their own laws).

III. The Scope and Application of the Law Enforcement Privilege Requires Clarification.

A. The Courts of Appeals Disagree as to the Scope of the Law Enforcement Privilege, and Are Not Clear as to Its Application Here.

In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), this Court recognized a qualified privilege in the federal government to "withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." In the five decades since *Roviaro* was decided, the lower courts have expanded this limited privilege in numerous and varied ways, often embracing a much broader concept that has become known as a "law enforcement privilege." *See, e.g., United States v. Cintolo*, 818 F.2d 980, 983-84 (1st Cir. 1987); *In re Dep't. of Investig. of the City of New York*, 856 F.2d 481 (2d Cir. 1988); *United States v. O'Neill*, 619 F.2d 222, 229-30 (3d Cir. 1980); *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568-69 (5th Cir. 2006); *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). The proper contours of the privilege in this area are now quite uncertain. This Court's review is required to bring clarity to the law.

The privilege described in *Roviaro* has no application to a case such as this. As the Court there explained,

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.

353 U.S. at 59-60. Understood this way, the privilege is concerned with not deterring innocent citizens from coming forward to tell the government what they know about criminal activity. That concern is not present where, as here, the privilege is invoked to conceal information about individuals who *themselves* may be guilty of criminal wrongdoing, thus impeding the efforts of a government with jurisdiction to investigate and prosecute such wrongdoing. If "[t]he scope of the privilege is limited by its underlying purpose," *id.* at 60, then the privilege recognized in *Roviaro* simply has no application here, and the Court should confirm that.

Beyond the narrow *Roviaro* privilege, the lower courts have embraced different versions of a law enforcement privilege. The D.C. Circuit has recognized a privilege protecting "a public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or

sources." *Black v. Sheraton Corp. of America*, 564 F.2d 531, 545 (D.C. Cir. 1977). The Second Circuit has articulated a similar privilege designed to "prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *In re Dep't of Investig. of City of New York*, 856 F.2d at 484.

Other courts describe the privilege more narrowly. The Fifth Circuit, for example, acknowledges "the existence of a law enforcement privilege beyond that allowed for identities of confidential informants [i.e., the *Roviaro* privilege]," but it relates the privilege to "information about *ongoing* criminal investigations" by the federal government. *In re U.S. Dept. of Homeland Sec.*, 459 F.3d at 569, 568 (emphasis added). "[T]he purpose of the privilege in the Fifth Circuit is to protect from release documents relating to an ongoing criminal investigation," thereby safeguarding the integrity of such investigations as they proceed. *Id.* at 569 n.2. It does not appear, however, that the Fifth Circuit would extend the privilege to circumstances where, as here, there is no ongoing federal investigation. *See Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969) (stating that "pendency of a criminal investigation is a reason for denying discovery of investigative reports," but that the reason "would not apply indefinitely"). That poses an important conflict with the broader privilege

recognized by other courts. Clarification from this Court is in order.

More fundamentally, the facts of this case expose a deeper uncertainty regarding the scope and application of the privilege. Until the First Circuit issued its decision below, cases implicating the law enforcement privilege generally involved attempts by private litigants to access federal law enforcement records and other materials. Neither this Court's decision in *Roviaro* nor the leading lower court decisions expanding the privilege addressed a sovereign State's request for information as part of the administration of its own criminal laws. Plainly, the interests and values at stake are very different in such cases. Indeed, as the Third Circuit has recognized, "[t]here is an anomaly in the assertion of a public interest 'privilege'" by one governmental entity in order to keep information from another governmental entity that is itself invested with the authority "to investigate in the public interest." *O'Neill*, 619 F.2d at 230. Whether, how, and to what extent a generalized law enforcement privilege ought to apply in such circumstances is entirely unclear. The core state interests at stake cry out for answers from this Court.

B. The First Circuit Erred in its Broad, Categorical Application of the Law Enforcement Privilege.

Although it purported to "balanc[e] the federal government's interest in preserving the confidentiality

of sensitive law enforcement techniques against the requesting party's interest in disclosure," App. 26-27, in fact the First Circuit categorically rejected the Commonwealth's disclosure requests and applied the privilege across the board. With respect to information about the Ojeda-Ríos shooting, the First Circuit determined that disclosure of the FBI's operation order and related protocols and procedures "ha[d] the potential to thwart future FBI operations by publicizing the internal operations of that agency." App. 33. And although it recognized that the Commonwealth's separate request for the names of the federal officers involved was "distinct from information about FBI protocols and techniques," it concluded that the privilege also covered that information because "the individuals at issue are not suspected of criminal activity unrelated to the operation that implicates those protocols and techniques." App. 36. This was no balancing at all, but was instead a categorical embrace of the FBI's assertions without any serious attention to the Commonwealth's sovereign interests.

The most conspicuous flaw in the First Circuit's analysis is its failure to credit the Commonwealth's sovereign interest in investigating possible violations of its laws. The court stated that whereas privilege assertions are normally litigated in the context of the cases prompting the requesting party's need for the information in question, "[h]ere . . . there is no underlying litigation; the 'need' is Puerto Rico's assertion that the requested materials might be of aid to a criminal investigation." App. 34. That need was

further lessened here, the court suggested, because (1) the federal OIG had already investigated the Ojeda-Ríos shooting, and (2) the Commonwealth's power to punish federal officers for violating its laws is limited by the rule that "federal officials are generally immune from state prosecution for actions performed within the scope of their official duties." App. 34-35. Yet neither of those points diminishes the Commonwealth's genuine and legitimate need for the information it has requested.

As this Court confirmed in *Soper*, a State has "the right . . . to inquire into suspected crime in its territory," and that right "justifies the use of investigation by its officers and the questioning of . . . federal officers under suspicion." 270 U.S. at 42. If such investigations yield prosecutions, the defendants may be able to invoke federal officer immunity to avoid some or all of the charges. But the possibility of immunity cannot preclude state investigation in the first place. The reason, as the First Circuit acknowledged even as it reached that precise result, is that such a broad privilege could easily "extend beyond the scope of the immunity actually available to the officers," thus "withhold[ing] information about acts not taken in the course of their official duties." App. 35-36. Preventing the State from accessing critical information about events facially within its criminal jurisdiction – here, a death (the Ojeda-Ríos shooting) and the use of force against journalists (the 444 de Diego incident) – makes it impossible for the State to know whether state law was violated, as well as

whether federal immunity shields those responsible for the violations. A sovereign in the federal system has the "right" (*Soper*, 270 U.S. at 42) to answer those questions for itself – not simply to accept the findings of a federal agency. By not acknowledging the full dimensions of that sovereign right, the First Circuit failed to engage in anything approaching an appropriate balancing of the interests.

Finally, balancing the interests at stake should involve the consideration of far more specific information than the First Circuit relied upon. The proponent of law enforcement privilege "must make a clear and specific showing" of the precise harms that disclosure of each category of information would entail. *Schiller v. City of New York*, 244 F.R.D. 273, 281 (S.D.N.Y. 2007). The district court, in turn, should judge the adequacy of that showing by engaging in its own *in camera* examination of the materials in question. *See In re U.S. Dept. of Homeland Sec.*, 459 F.3d at 570. And the court should consider employing measures short of complete nondisclosure, such as a protective order governing how and by whom the material may be used. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51, 66 (E.D.N.Y. 2004) (finding that "the imposition of a protective order would negate the conditions underlying the application of the law enforcement privilege"). None of that took place here.

A proper weighing of the interests in this case would surely have yielded for the Commonwealth at least some of the information it seeks. At a minimum, this Court should clarify how the interests implicated in

an assertion of law enforcement privilege should be weighed, and then remand this case for such weighing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2007

490 F.3d 50

United States Court of Appeals, First Circuit.

COMMONWEALTH OF PUERTO RICO,
Plaintiff, Appellant,

v.

UNITED STATES of America; Alberto R. Gonzales, Attorney General; Robert Mueller, Director of the FBI; Rosa Emilia Rodriguez-Vélez, U.S. Attorney for the District of Puerto Rico; and Luis S. Fraticelli, Special Agent in Charge of the FBI in Puerto Rico,
Defendants, Appellees.

No. 06-2449.

Heard Jan. 11, 2007.
Decided June 15, 2007.

Salvador J. Antonetti-Stutts, Solicitor General, with whom Roberto J. Sánchez-Rámos, Secretary of Justice, Kenneth Pamias-Velázquez, Special Aide to the Secretary of Justice, Jorge R. Roig-Colón, Assistant Secretary of Justice, and Hiram A. Meléndez-Juarbe, Legal Advisor to the Secretary of Justice, were on brief, for appellant.

Mark B. Stern, Civil Division, Department of Justice, with whom Peter D. Keisler, Assistant Attorney General, Rosa Emilia Rodriguez-Vélez, U.S. Attorney, Jonathan F. Cohn, Deputy Assistant Attorney General, and Alisa B. Klein, Civil Division, Department of Justice, were on brief, for appellees.

Before BOUDIN, Chief Circuit Judge, LIPEZ, Circuit Judge, and SHADUR,* Senior District Judge.

LIPEZ, Circuit Judge.

This case presents a novel question: does the Commonwealth of Puerto Rico have a nonstatutory cause of action, grounded in its sovereign authority under the Constitution, to obtain information from the Federal Bureau of Investigation ("FBI") in connection with a criminal investigation into the activities of FBI employees? We conclude that it does not. Instead, under the circumstances of this case, Puerto Rico must pursue the information it seeks under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Further, in keeping with persuasive authority from other circuits, we hold that the FBI may assert a qualified privilege to protect sensitive law enforcement techniques and procedures from disclosure. Having considered the application of that privilege in this case, we affirm the decision of the district court holding that the FBI did not err in withholding the requested information.

I.

This appeal involves two consolidated district court cases, Nos. 06-1306 and 06-1305,[1] arising from

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* Of the Northern District of Illinois, sitting by designation.

[1] The events in No. 06-1306 occurred before those in No. 06-1305, so we will discuss No. 06-1306 first despite its higher docket number.

subpoenas for FBI records issued by the Puerto Rico Department of Justice ("PRDOJ"). The relevant facts are largely undisputed; where disputes exist, we note them but find that they are immaterial to our disposition of the case.

A. Case No. 06-1306: Ojeda Subpoena

In the 1970s, Filiberto Ojeda Ríos helped found the Macheteros, an organization that advocates independence for Puerto Rico through armed struggle against the United States government. In 1983, the Macheteros stole $7.1 million from a bank in Connecticut. The FBI apprehended Ojeda in 1985, and, during his arrest, Ojeda shot an FBI agent in the face, permanently blinding the agent in one eye. Ojeda was acquitted for assaulting the agent following a trial in Puerto Rico. He then skipped bail while on trial for bank robbery and was sentenced in absentia in 1992. Fifteen years later, in September 2005, the FBI attempted to apprehend Ojeda at his residence in Hormigueros, Puerto Rico. During this intervention, Ojeda shot two FBI agents and was himself fatally wounded.

The PRDOJ commenced an investigation into the intervention. On October 4, 2005, a PRDOJ prosecutor issued a subpoena pursuant to title 34, section 1476 of the Puerto Rico Code commanding then United States Attorney Humberto Garcia to produce materials including: (1) a copy of the "Operation Order" (a document establishing the plan or rules of

engagement for the FBI intervention at Ojeda's residence); (2) the name, rank, division, address, and telephone numbers of every person who participated in or made decisions regarding the intervention, as well as an organizational diagram showing these individuals' rank on the line of command; (3) various equipment, including, but not limited to, all bullet-proof vests, helmets, weapons, and vehicles involved in the intervention; (4) any inventory of the property occupied during the intervention; (5) copies of any expert reports relating to the intervention or Ojeda's death; (6) copies of any audio or video recordings of the events relating to the intervention; (7) copies of all photographs relating to the intervention; and (8) copies of any relevant general FBI protocols, including those relating to violent interventions and potentially deadly force. In subsequent correspondence, the PRDOJ explained that the requests related to a "criminal investigation" that it was conducting into Ojeda's death.

By letter dated October 17, the FBI declined to produce the requested materials, explaining that its internal regulations prohibited disclosure of records compiled for law enforcement purposes. The letter stated that the denial of the PRDOJ's request was a "final agency decision which may be reviewed by the United States District Court."

After further communications among the PRDOJ, FBI, and United States Attorney's Office, the U.S. Attorney indicated by letter dated November 9 that the FBI would allow the PRDOJ to examine

some of the items listed in the subpoena, including the bulletproof vests, helmets, weapons, and vehicles used during the intervention and the photographs taken before, during, and after the intervention. The FBI stipulated that it would retain official custody of these items and that an FBI official would be present during the inspection.

The PRDOJ initially acceded to these terms, but subsequently reiterated the substance of its original demand in a letter dated January 20, 2006. The FBI refused this demand, again noting that its refusal constituted "final agency action." The PRDOJ filed suit in March 2006 to compel disclosure of the requested materials.

B. Case No. 06-1305: 444 de Diego Subpoena

Using information obtained from Ojeda's residence to establish probable cause, the FBI obtained a search warrant for a residential condominium located at 444 de Diego in San Juan, Puerto Rico. The FBI executed the warrant in February 2006, and a large group of protesters, reporters, and members of the general public gathered outside. The United States asserts that some of these individuals breached an established police line, and an FBI agent used pepper spray to keep people behind the line.

The PRDOJ issued subpoenas to U.S. Attorney Garcia and to Luis Fraticelli, Special Agent in Charge of the FBI San Juan Field Office, requesting three categories of materials: (1) the name, rank, division,

address, and telephone number of the two FBI agents who allegedly used pepper spray and whose photos were attached to the subpoena; (2) official photographs of these two FBI agents; and (3) internal FBI protocols relating to the use of force and pepper spray. The PRDOJ explained that the subpoenas were "part of the criminal investigation" of the PRDOJ into "the conduct of FBI agents during the execution of a search warrant" at 444 de Diego.

The FBI moved to quash the subpoenas in federal district court. After the PRDOJ indicated, at a hearing on March 2, that "it was actually evaluating other avenues through which to get the information about the federal agents, and that it had no serious intention of enforcing the challenged subpoenas," the district court concluded that the subpoenas were "effectively mooted." The court thus withheld action on the motion to quash. Subsequently, on March 23, the PRDOJ filed suit to compel the release of the requested records.

C. Proceedings Before the District Court

Puerto Rico's complaint in No. 06-1306 sought a declaratory judgment recognizing its right "to conduct a full investigation into the events leading to the death of Mr. Ojeda Rios," and an order "permanently enjoining Defendants from withholding any information relevant to the Commonwealth's investigation and ordering Defendants to comply with the Commonwealth's requests and produce the subpoenaed

information, objects and documents[.]" The complaint in No. 06-1305 sought identical relief with respect to Puerto Rico's "investigation into the events allegedly leading to the injury of members of the press and/or the public . . . on February 10, 2006, due to the alleged use of excessive force (including the alleged use of pepper spray) by FBI agents[.]"

In each complaint, Puerto Rico articulated five causes of action which entitled it to its requested relief. First, it stated that the FBI's decisions were not premised upon any federal regulation or statute. Second, it stated that the FBI's decisions exceeded any authority granted by the Housekeeping Act, 5 U.S.C. § 301. Third, it asserted a nonstatutory cause of action to vindicate its constitutional sovereign authority to enforce its criminal laws by obtaining the requested information. Fourth, it contended that APA review was "unwarranted" because such review "would impose an undue burden on the exercise of sovereign criminal authority that would run afoul of the Tenth Amendment." Finally, Puerto Rico claimed that, even if reviewed under the APA, the FBI's decision to withhold the information was arbitrary, capricious, and an abuse of discretion.

The district court consolidated the cases, the United States moved to dismiss, and Puerto Rico filed a motion for summary judgment. After considering these motions, the district court concluded that Puerto Rico had failed to establish a basis for its requested relief. The court rejected Puerto Rico's first two causes of action, explaining that, although the

FBI's internal regulations did not create a substantive right to withhold the information, the regulations incorporated federal common law establishing a privilege for law enforcement materials. The court also dismissed Puerto Rico's third cause of action, holding that Puerto Rico could not assert a nonstatutory cause of action, based on its sovereign right to enforce its criminal laws, to obtain the requested materials. The court thus concluded that Puerto Rico's request was subject to judicial review under the provisions of the APA, thereby rejecting Puerto Rico's fourth cause of action. Finally, on Puerto Rico's fifth and final cause of action, the court applied the APA's framework for review. Noting the FBI's interest in maintaining the confidentiality of sensitive law enforcement techniques, it found that the FBI's decision with respect to the Ojeda subpoena was neither arbitrary nor capricious. With respect to the 444 de Diego subpoena, the court concluded that there had been no final agency action, and thus the FBI's failure to release the information was not subject to judicial review. In sum, the court dismissed Puerto Rico's first through fourth causes of action, and, on the fifth cause of action, denied Puerto Rico's motion for summary judgment and granted summary judgment to the United States.

This appeal ensued.

II.

On appeal, Puerto Rico first contends that its sovereign right to enforce its criminal laws provides it with a nonstatutory cause of action to obtain the information it seeks from the FBI. It explains that, under our federal constitutional system, a state has a "judicially cognizable interest in the preservation of [its] own sovereignty," which includes its "ability to punish wrongdoers and enforce its criminal laws" and, more specifically, "to prosecute federal agents if they have acted unlawfully in carrying out their duties."[2] Consequently, "any impermissible federal interference with such *constitutional* sovereignty is amenable to resolution by a federal district court under its equitable powers." Puerto Rico concludes that "[a] direct cause of action for equitable relief is the only avenue to properly vindicate a State's constitutional claim of sovereign[] authority to enforce its criminal laws."

Although Puerto Rico acknowledges that agency decisions are normally reviewed under the APA, it argues that such review is inappropriate because: (1) "[i]t is unfounded to subject a State's sovereign penal authority to an administrative process that will be followed by an extremely limited form of judicial review"; (2) such review will place Puerto Rico "in a worse position to obtain information than private

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[2] The parties agree that Puerto Rico is situated identically to a state for purposes of this appeal.

parties" who can sue the federal government and request discovery under Federal Rule of Civil Procedure 26; and (3) APA review would allow the federal government to "commandeer[] state prosecutorial powers by deciding what information the State should consider in its investigations."[3]

As in all suits against the federal government, we must first consider whether sovereign immunity bars this claim. "It is long settled law that, as an attribute of sovereign immunity, the United States and its agencies may not be subject to judicial proceedings unless there has been an express waiver of that immunity." *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 597 (2d Cir.1999). The APA waives sovereign immunity under certain conditions:

> A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action in a court of the United States seeking relief other than

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[3] With respect to the "commandeering" issue, Puerto Rico does not develop its argument other than to cite to *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), which established that the federal government may not "commandeer" state governments by compelling state officials to enact or administer a federal regulatory program. In light of the lack of developed argumentation, we find it unnecessary to address this claim. *See Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 734 (1st Cir.1990) (explaining that issues "adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned").

> money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.[4] This waiver is for "'*all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity,' "*Trudeau v. Fed. Trade Comm'n,* 456 F.3d 178, 186 (D.C.Cir.2006) (quoting *Sea-Land Serv., Inc., v. Alaska R.R.,* 659 F.2d 243, 244 (D.C.Cir.1981)), and thus "'applies to any suit whether under the APA or not.'" *Id.* at 186 (D.C.Cir.2006) (quoting *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1328 (D.C.Cir.1996)); *see also Hostetter v. United States,* 739 F.2d 983, 985 (4th Cir.1984) ("In section 702 Congress has waived the defense of sovereign immunity in such nonstatutory review cases in which nonmonetary relief is sought. . . . "); *Jaffee v. United States,* 592 F.2d 712, 719 (3d Cir.1979) ("By waiving sovereign immunity in suits for 'relief other than money damages,' the Congress sought to 'facilitate nonstatutory judicial

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[4] At least one court has held that a state qualifies as a "person" within the meaning of the APA, *see Md. Dep't of Human Res. v. Dep't of Health & Human Servs.,* 763 F.2d 1441, 1445 n. 1 (D.C.Cir.1985), and the government does not argue otherwise here.

review of Federal administrative action. . . . '" (citation omitted)).

Although this persuasive authority indicates that sovereign immunity would pose no bar to Puerto Rico's claim for nonmonetary relief, the question remains whether Puerto Rico has the nonstatutory cause of action it invokes. In prior cases involving subpoenas issued by state entities, courts have held that the party requesting the subpoena must proceed under the APA. *Houston Bus. Journal, Inc. v. Office of Comptroller of the Currency,* 86 F.3d 1208, 1212 (D.C.Cir.1996) ("[A] state-court litigant must request the documents from the federal agency pursuant to the agency's regulations. . . . If the agency refuses to produce the requested documents, the sole remedy for the state-court litigant is to file a collateral action in federal court under the APA."); *Edwards v. U.S. Dep't of Justice,* 43 F.3d 312, 316 (7th Cir.1994) ("The subpoenas were in effect a request for information from an executive department. . . . The subpoena is treated as an administrative demand."(citations omitted)).

Puerto Rico asserts, however, that its suit is an exception to this principle due to its constitutionally-based sovereign authority to enforce its criminal laws. It is uncontroverted that states may enact and enforce criminal laws, and that this power is constitutional in nature. As the Supreme Court explained in *Heath v. Alabama,* 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985), "[t]he Constitution leaves in the possession of each State 'certain exclusive and very

important portions of sovereign power.' Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code." *Id.* at 93, 106 S.Ct. 433 (quoting Federalist No. 9); *see also Engle v. Isaac,* 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) ("The States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders. . . . ").

When a party claims that a violation of its constitutional rights has occurred and it has "no effective means other than the judiciary to enforce these rights, [that party] must be able to invoke the existing jurisdiction of the courts for the protection of [its] justiciable constitutional rights." *Davis v. Passman,* 442 U.S. 228, 242, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (holding that a "cause of action for damages" arises under the Constitution when federal officers violate Fourth Amendment rights). Where, as here, a state has asserted a right that is constitutional in nature, "we are bound by a strong presumption in favor of providing the state some vehicle for vindicating its rights." *R.I. Dep't of Envtl. Mgmt. v. United States* ("*RIDEM*"), 304 F.3d 31, 41 (1st Cir.2002).

In the context of agency action, parties occasionally invoke the principles of "nonstatutory review." Nonstatutory review is available pursuant to the general "federal question" jurisdiction of the federal

courts under 28 U.S.C. § 1331 in situations where "Congress makes no specific choice of [the court in which judicial review is to occur] in the statute pursuant to which the agency action is taken, or in another statute applicable to it." *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1439 (D.C.Cir.1988). "The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is *ultra vires*." *RIDEM*, 304 F.3d at 42. Thus, if "a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Reich*, 74 F.3d at 1327 (citing Clark Byse & Joseph V. Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L.Rev. 308, 321 (1967)). Puerto Rico claims that the FBI acted outside the scope of its legal authority in withholding the requested materials, in violation of the Constitution, and that the Constitution itself provides a basis for nonstatutory review of that violation.

In *RIDEM*, we evaluated a similar claim for nonstatutory review that was "constitutional in scope." 304 F.3d at 41. There, the state of Rhode Island brought suit to assert that its sovereign immunity (a "constitutionally protected sovereign interest") entitled it to enjoin an administrative proceeding that the Department of Labor had initiated against it. *Id.* at 36. We noted that the Supreme

Court has established two "critical factors [that] must be present to invoke nonstatutory review." *RIDEM*, 304 F.3d at 42. First, such review may occur only if its absence would "'wholly deprive the party of a meaningful and adequate means of vindicating its . . . rights.'" *Id.* (quoting *Bd. of Gov'rs of Fed. Reserve Sys. v. MCorp. Fin.*, 502 U.S. 32, 43, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991)). Second, "Congress must not have clearly intended to preclude review of the agency's particular determination." *Id.* at 42-43 (citing *Bd. of Gov'rs*, 502 U.S. at 44, 112 S.Ct. 459). We then applied these two factors and concluded that Rhode Island had a direct, nonstatutory cause of action to enjoin an administrative proceeding on the ground of sovereign immunity, even though the APA requires that parties exhaust their administrative remedies before seeking judicial review. *Id.* at 43. We explained that Rhode Island had no other avenue for vindicating its right to immunity from suit and that Congress had not explicitly precluded its action. *Id.* Moreover, we emphasized that "general equitable considerations" favored a nonstatutory action, including the fact that Rhode Island had claimed the violation of "a clear right that is constitutional in nature" and that its "immunity would be effectively lost absent judicial review." *Id.*

Puerto Rico's situation differs materially from that of Rhode Island in *RIDEM*. Critically, with respect to the first requirement for nonstatutory

review, Puerto Rico does have a means of vindicating its rights without nonstatutory review: the APA.[5] Within that judicial review framework, Puerto Rico may assert its sovereign interest in enforcing its criminal laws as a consideration in our review of the agency's decision. Thus, we cannot conclude that Puerto Rico's rights "would be effectively lost absent judicial review." *Id.* at 43 (citing *Morales v. Trans World Airlines,* 504 U.S. 374, 381, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)). Likewise, with respect to the second requirement, although Congress has not explicitly prohibited nonstatutory review in a case such as this, the existence of the APA as a means for

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[5] Although *RIDEM* is the only case the parties have cited that involves a sovereign entity attempting to assert its constitutionally-based sovereign prerogatives, other cases support the notion that the absence of another avenue for the parties to vindicate their rights is a necessary condition for nonstatutory review. For example, in *Leedom v. Kyne,* 358 U.S. 184, 190-91, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), the Court held that the president of a union had a nonstatutory cause of action to file suit against the National Labor Relations Board to set aside the NLRB's certification, in violation of 29 U.S.C. § 159(b)(1), of a bargaining unit including both professional and nonprofessional employees. The Court explained that a critical factor in allowing the union president to bring suit despite the lack of explicit statutory authorization was that " 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control to protect and enforce that right." *Id.* at 190, 79 S.Ct. 180 (quoting *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.,* 320 U.S. 297, 300, 64 S.Ct. 95, 88 L.Ed. 61 (1943)).

reviewing the FBI's actions at least implies that nonstatutory review is inappropriate.

We recognize that nonstatutory review might have allowed Puerto Rico to obtain a more favorable standard of review and to circumvent certain of the APA's procedural requirements. However, in considering Puerto Rico's demand for a more favorable standard of judicial review on constitutional grounds, we must be mindful of the Supremacy Clause, which "is designed to ensure that states do not 'retard, impede, burden, or in any manner control' the execution of federal law." *New York v. Tanella,* 374 F.3d 141, 147 (2d Cir.2004) (quoting *McCulloch v. Maryland,* 17 U.S.(4 Wheat.) 316, 436, 4 L.Ed. 579 (1819)). We are not suggesting that the Supremacy Clause alone provides the basis for rejecting Puerto Rico's theory of a nonstatutory cause of action to obtain law enforcement information from the FBI. But Puerto Rico portrays its sovereign authority over law enforcement as paramount in the analysis. That cannot be so. The Supremacy Clause reminds us that the federal government also has a critical interest in carrying out its own law enforcement responsibilities. In most instances, federal and state law enforcement interests are complementary. However, when a state's interest in investigating the agents of a federal law enforcement entity arguably conflicts with that federal entity's need to protect certain information relating to law enforcement activities, Congress has provided a mechanism – the APA – for resolving these conflicts. Puerto Rico has not convinced us that

this congressional choice was somehow constitutionally insufficient and hence Puerto Rico must have a nonstatutory cause of action to vindicate its law enforcement interests. To the contrary, for the reasons we have expressed, we conclude that the judicial review provided by the APA for the denial of information by a federal agency is compatible with Puerto Rico's sovereign authority under the Constitution for the enforcement of its criminal laws.

III.

Under the APA, we will overturn the FBI's decision not to release the requested information only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The fact that Puerto Rico made its request for information in the form of a subpoena from the PRDOJ does not affect the nature of our review under the APA. The subpoenas were "in effect a request for information from an executive department," and, consequently, "the subpoena[s] are treated as an administrative demand." *Edwards v. U.S. Dep't of Justice,* 43 F.3d 312, 316 (7th Cir.1994) (explaining that a subpoena initiates the administrative process); *see also* 28 C.F.R. § 16.21.[6]

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[6] We note that, where a subpoena is issued to a non-party federal government agency in conjunction with litigation in state court, the state court may not enforce the subpoena against the federal government due to federal sovereign immunity, and the

(Continued on following page)

In applying the arbitrary and capricious standard of review, we are deferential to the agency's decision. In general, an agency's "choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources." *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir.1999). We review de novo the decision of the district court because that court, "'limited to the administrative record, is in no better position to review the agency than the court of appeals.'" *Edwards*, 43 F.3d at 314 (quoting *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1161 (9th Cir.1980)).

In evaluating the FBI's decision, we take into account both that agency's internal regulations

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federal courts have consistently held that they lack jurisdiction to enforce the subpoena in cases where the government has removed the subpoena proceedings to federal court. *See Smith v. Cromer*, 159 F.3d 875, 879 (4th Cir.1998); *Houston Bus. Journal*, 86 F.3d at 1211-12; *Louisiana v. Sparks*, 978 F.2d 226, 235 (5th Cir.1992). Instead, courts have explained that, to obtain federal judicial review of a federal agency's refusal to release information, "a state-court litigant must request the documents from the federal agency pursuant to the agency's regulations," and that if "the agency refuses to produce the requested documents, the sole remedy for the state-court litigant is to file a collateral action in federal court under the APA." *Houston Bus. Journal*, 86 F.3d at 1212. Here, of course, the subpoena was not issued pursuant to any underlying litigation. However, the same principle – that a party wishing to obtain information from the federal government must file a request pursuant to the agency's regulations, and may seek judicial review only under the APA – applies in the present case as well.

governing the release of material and the substantive law governing the law enforcement privilege.

A. Regulations

Under the Housekeeping Act, 5 U.S.C. § 301, federal agencies may promulgate regulations establishing conditions for the disclosure of information. The Supreme Court upheld the validity of such regulations in *United States ex rel. Touhy v. Ragen,* 340 U.S. 462, 468, 71 S.Ct. 416, 95 L.Ed. 417 (1951), explaining that it is appropriate for the head of an agency "to prescribe regulations not inconsistent with law for 'the custody, use, and preservation of the records, papers, and property appertaining to'" the agency's business. Within the administrative review process, "[t]he regulations 'provide guidance for the internal operations of the [agency],'" but do not create a substantive defense to disclosure. *Kwan Fai Mak v. FBI,* 252 F.3d 1089, 1092 (9th Cir.2001) (quoting 28 C.F.R. § 16.21(d)). In other words, "the regulations do not 'create an independent privilege' authorizing the Department of Justice to withhold information." *Id.* (quoting *Exxon Shipping Co. v. U.S. Dep't of Interior,* 34 F.3d 774, 780 (9th Cir.1994)). Rather, they "simply set forth administrative procedures to be followed when demands for information are received." *Id.*

Here, pursuant to the Housekeeping Act, the FBI has promulgated regulations explaining that, in deciding whether to release information, its officials

should consider "[w]hether disclosure is appropriate under the rules of procedure governing the case" and "[w]hether [the] disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a)(1), (2). Situations in which disclosure will not be made include those where "[d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* § 16.26(b)(5).

As we have explained, the *Touhy* regulations are only procedural, and do not create a substantive entitlement to withhold information. Thus, the FBI's compliance with the regulations cannot be a sufficient justification for withholding requested materials. Instead, our review of the reasonableness of the agency's decision focuses on the substantive law concerning privilege, to which we now turn.

B. Law Enforcement Privilege

The Supreme Court first recognized a qualified privilege for certain information related to law enforcement activities in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). There, the Court explained that the government has a qualified privilege to withhold the identities of confidential informants. *Id.* at 59, 77 S.Ct. 623. Such a privilege "further[s] and protect[s][ ] the public

interest in effective law enforcement," encouraging citizens to communicate their knowledge of crimes by preserving their anonymity. *Id.* The Court also noted that "[t]he scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Id.* at 60, 77 S.Ct. 623.

Since *Roviaro,* we have recognized a privilege for law enforcement materials in other circumstances. In *United States v. Cintolo,* 818 F.2d 980, 983-84 (1st Cir.1987), the FBI, with judicial authorization, had monitored conversations between the defendant and various confederates via hidden microphones placed within an apartment. The district court refused to allow the defense to question witnesses "concerning the precise location of the electronic surveillance devices" on the ground that such questioning would "jeopardize future criminal investigations." *Id.* at 1002. In upholding the district court's decision, we first noted that other circuits had found that the privilege could cover "sensitive investigative techniques." *Id.* We then recognized a qualified privilege for the "disclosure of confidential government surveillance information," explaining that "discoverability of this kind of information will enable criminals to frustrate future government surveillance and perhaps unduly jeopardize the security of ongoing investigations." *Id.* We emphasized that the privilege could be overcome by a sufficient showing of need, and thus

concluded that courts must determine on a case-by-case basis whether a party has "demonstrated an authentic 'necessity,' given the circumstances, to overbear the qualified privilege." *Id.*

Other circuits have explicitly acknowledged a broader privilege for law enforcement materials. The D.C. Circuit has explained that the privilege for investigatory materials is "rooted in common sense as well as common law," noting that "law enforcement operations cannot be effective if conducted in full public view" and that the public has an interest in "minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542, 545 (D.C.Cir.1977). Similarly, in *In re Department of Investigation of the City of New York*, 856 F.2d 481 (2d Cir.1988), the Second Circuit explained:

> [T]he law enforcement privilege [] has been recognized in the absence of a statutory foundation, and [] is largely incorporated into the various state and federal freedom of information acts. The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.

Id. at 483-84 (citations and footnotes omitted); *see also United States v. Amodeo,* 44 F.3d 141, 147 (2d Cir.1995) (citing *In re Dep't of Investigation*). Most recently, the Fifth Circuit acknowledged "the existence of a law enforcement privilege beyond that allowed for identities of confidential informants" in a case involving documents containing "information about ongoing criminal investigations – including investigative leads, law enforcement methods and techniques, internal investigative memoranda, and identifying information relating to witnesses and law enforcement personnel, including undercover operatives." *In re U.S. Dep't of Homeland Sec.,* 459 F.3d 565, 569, 568 (5th Cir.2006). The court remanded for the district court to make an in camera determination regarding the privilege, noting that the rationale for such a privilege is "even more compelling now" because "in today's times the compelled production of government documents could impact highly sensitive matters relating to national security." *Id.* at 569.

Although Puerto Rico has not made a request for information under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552,[7] the provisions of this statute also provide guidance in determining the appropriate scope of the privilege. The law enforcement exemption to FOIA shields from disclosure

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[7] The United States notes this omission but also acknowledged at oral argument that FOIA would not be an appropriate vehicle for all of the materials that Puerto Rico sought in its subpoena.

documents whose production would, inter alia, "interfere with enforcement proceedings" or "endanger the life or physical safety of any individual." *Id.* § 552(b)(7); *see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't. of Justice,* 331 F.3d 918, 925-26 (D.C.Cir.2003) (explaining that, in enacting 5 U.S.C. § 552(b)(7)(A) "'Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations'" (quoting *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 232, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978))).

Puerto Rico argues that the law enforcement privilege, whatever its source and scope, must yield to a state's sovereign authority to investigate violations of its criminal laws. However, it cites no case supporting such a sweeping proposition.[8] But the absence of

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[8] Puerto Rico offers one circuit court case involving an "intergovernmental privilege dispute" and suggests that the privilege is less compelling in such a situation. In *United States v. O'Neill,* 619 F.2d 222 (3d Cir.1980), the United States had moved to enforce a subpoena duces tecum against the Philadelphia Police Department. Although the court did comment that "[t]here is an anomaly in the assertion of a public interest 'privilege' by the City to justify withholding information from a federal Commission charged by Congress to investigate in the public interest the possible denial of equal protection by, inter alia, local government units," *id.* at 230, its decision focused primarily on the fact that the Police Department had not properly asserted the privilege and emphasized the lack of Supreme Court precedent supporting a "broad amorphous Government privilege" to protect "material relating to ongoing civil and criminal investigations," *id.* at 229.

such authority does not minimize the legitimate interests of Puerto Rico in securing information relevant to its criminal investigations. The important questions are how far the law enforcement privilege should extend and how, in the face of Puerto Rico's demand for information, the privilege should be applied in this case.

Given the persuasive authority from other circuits, the law enforcement exemption set forth in FOIA, and "the public interest in effective law enforcement," *Roviaro,* 353 U.S. at 59, 77 S.Ct. 623, we deem it appropriate to extend the privilege we previously recognized for "confidential government surveillance information," *Cintolo,* 818 F.2d at 1002, to "law enforcement techniques and procedures," *In re Dep't of Investigation,* 856 F.2d at 484.[9] Indeed, the justification we cited in *Cintolo* – that disclosing the location of surveillance information would jeopardize future surveillance operations – applies similarly to the information about techniques and protocols that Puerto Rico has requested here. Their disclosure would also jeopardize future criminal investigations. We emphasize that this qualified privilege is subject to balancing the federal government's interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party's

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[9] Under Federal Rule of Evidence 501, federal courts retain the power to develop common law privileges on a case-by-case basis. *See United States v. Gillock,* 445 U.S. 360, 367, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980).

interest in disclosure.[10] That balancing must be done with particular care in situations, such as this one, involving conflicts between the federal and state governments.

Having recognized, in principle, a qualified privilege for law enforcement techniques and procedures, we turn now to the task of evaluating under the APA the FBI's response to the specific information requests of Puerto Rico.

IV.

A. Procedural Challenges

Before we address the substance of the FBI's decision not to disclose the requested materials, we must resolve an array of procedural objections that Puerto Rico has raised to the assertion of privilege in the proceedings below. Puerto Rico first complains that the privilege was not properly invoked because the FBI did not submit an affidavit from the head of the agency, the district court did not perform an in camera review of the materials that were the subject of the subpoena, and the assertion of privilege was not accompanied by the FBI's item-by-item balancing of the harm to federal law enforcement interests and

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[10] Certain procedures, such as in camera review of the requested materials and particularized assertion of the relevant interests, may aid in a court's assessment of these interests. We will discuss the applicability of such procedures in this case *infra* at Section IV.A.

the necessity of the materials to Puerto Rico's investigation. The United States responds that Puerto Rico did not raise these objections in the district court and therefore has waived them.

Before the district court, Puerto Rico stated, in its opposition to the United States' motion to dismiss, that "Defendants' failure to properly assert, at the time they decided not to disclose, the list of privileges that they now pretend to raise constitutes a waiver of all such privileges." In other words, Puerto Rico insisted that the United States could not offer reasons to the district court for withholding the information that it had not given to Puerto Rico when it denied the Commonwealth's demand for information. In its motion for summary judgment, Puerto Rico further contended that the decision not to release the materials was arbitrary and capricious because it is premised exclusively on a regulation that does not create a privilege. Defendants' wholly conclusory assertion that disclosure of the information is not warranted under the regulations simply lacks any valid explanation for the denial. Defendants did not assert a substantive privilege for the Court to consider, or even offer a valid explanation for the refusal to disclose. Defendants did not even purport to substantiate or justify their denial with an analysis of the pertinent factors.

Puerto Rico did not, however, identify for the district court's consideration the specific procedures it now requests: an affidavit from the head of the FBI,

an in camera review of the materials, and an item-by-item balancing of the interests at stake in disclosure of the materials.

We must also consider the manner in which the United States asserted the privilege. In its October 17, 2005 letter denying the request for information with respect to the Ojeda subpoena, the FBI explained that "[a] determination has been made not to disclose any of the information, objects and documents requested by the PRDOJ" because such disclosure "would involve the conditions enumerated in [28 C.F.R.] § 16.26(b)(5)."[11] With respect to the 444 de Diego subpoena, the United States' motion to quash explained that disclosure of the internal protocols "would reveal investigative and enforcement techniques" and that disclosure of the identities and official photographs of the FBI agents would violate their privacy rights and "pose a serious security threat."

After Puerto Rico filed its complaint, the United States' motion to dismiss articulated further grounds for the assertion of the law enforcement privilege with respect to the materials requested in the Ojeda subpoena:

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[11] As noted, 28 C.F.R. § 16.26(b)(5) states that disclosure will not be made when it "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired."

> A person possessing these documents would learn, *inter alia,* how the FBI goes about capturing a fugitive who is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of sensitive law enforcement settings, and the way in which law enforcement information (such as the location of Mr. Ojeda Rios) is gathered.

The United States further noted that most of the materials are also protected by the investigatory files privilege, and finally emphasized that the privacy interests of its agents favored nondisclosure of their names and other personal information. It made similar arguments with respect to the materials requested in the 444 de Diego subpoena, explaining that "the release of internal FBI protocols . . . would reveal law enforcement techniques" and that "[t]he release of the identity, rank, and division of the FBI agents could also reveal law enforcement techniques, by revealing the manner in which the FBI staffs these types of operations."

We acknowledge that the procedures Puerto Rico references for the first time on appeal may enhance the ability of a district court to evaluate fully and fairly the interests at stake in a case such as this. Judging these interests in the abstract seems problematic. Here, however, Puerto Rico failed to request before the district court the procedures it now specifies. This failure constitutes a waiver of any objection premised on the absence of those procedures. *See*

Persson v. Scotia Prince Cruises, Ltd., 330 F.3d 28, 33 (1st Cir.2003). Moreover, the circumstances here mitigate the risk that the absence of such procedures caused an unfair result. The United States clearly and repeatedly asserted the law enforcement privilege as its ground for refusing to disclose the requested information, and it articulated more specific reasons with respect to the various categories of materials. There was no mistaking the basis for the FBI's refusal to provide the information. Finally, as the United States explains, Puerto Rico requested broad categories of information (i.e., all internal FBI protocols relating to certain types of operations). Those generalities did not help Puerto Rico establish the "authentic 'necessity,'" *Cintolo,* 818 F.2d at 1002, for the information it sought.

Puerto Rico also contends that the United States has waived any law enforcement privilege that may exist by disclosing some of the requested information in a detailed, two hundred page report.[12] Again, Puerto Rico failed to raise this objection before the district court, and again Puerto Rico has waived it.[13]

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[12] *See* U.S. Department of Justice, Office of the Inspector General, A Review of the September 2005 Shooting Incident Involving the FBI and Filiberto Ojeda Ríos, August 6, 2006, *available at* http://www.usdoj.gov/oig/special/s0608/full-report.pdf.

[13] Although the report was released after the parties filed their motions, Puerto Rico still had ample time to raise this issue before the district court. The court did not issue a ruling until September 26, 2006, nearly two months after the report was released. Indeed, the court cited the report in its opinion.

In any event, the claim lacks merit. Courts have held in the context of executive privilege that "release of a document only waives these privileges for the document or information specifically released, and not for related materials." *In re Sealed Case,* 121 F.3d 729, 741 (D.C.Cir.1997); *see also Smith v. Cromer,* 159 F.3d 875, 880 (4th Cir.1998) (explaining that "disclosure of factual information does not effect a waiver of sovereign immunity as to other related matters"). This limited approach to waiver serves important interests in open government by "ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents." *In re Sealed Case,* 121 F.3d at 741.

The United States has been reasonably forthcoming in releasing information related to the Ojeda intervention. The FBI allowed Puerto Rico to inspect bulletproof vests, helmets, weapons, and vehicles used during the intervention and the photographs taken before, during, and after the intervention. Moreover, the Office of the Inspector General also released a report detailing the findings of its investigation into the intervention. *See supra* note 12. It would be illogical to punish the United States for its voluntary disclosure of these materials by also forcing it to disclose other information that it has deemed privileged.

Having found that Puerto Rico's procedural claims lack merit, we turn now to the substance of

the FBI's decision to withhold the requested materials.

B. Ojeda Subpoena

The FBI refused to produce the materials specified in the Ojeda subpoena, which included the "Operation Order," identifying information for the agents involved in the intervention, reports and recordings related to the intervention, and a wide array of information regarding FBI protocols and operating procedures. As its basis for asserting the privilege with respect to this information, the United States explains that the requested materials include information about sensitive law enforcement techniques that must remain confidential to allow the FBI to operate effectively.

As the district court explained, the disclosure of these materials would reveal

> how the FBI goes about capturing a fugitive who is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of law enforcement settings, and the way in which law enforcement information is gathered.

Disclosure of such information has the potential to thwart future FBI operations by publicizing the internal operations of that agency.

Given the qualified nature of the privilege, however, the critical question is whether Puerto Rico has shown a necessity for the information sufficient to overcome this qualified privilege. In favor of disclosure, Puerto Rico's chief argument is its interest in asserting its sovereign authority to investigate and prosecute its criminal laws. It explains that such authority is constitutional in nature, and thus deserves greater weight in our balancing calculus. It also emphasizes that no alternative means exists to obtain the information it seeks. Finally, Puerto Rico contends that an overbroad reading of the privilege is tantamount to granting federal officers immunity from even preliminary criminal investigations.

In response, the United States first explains that the balancing of interests typically takes place in the course of underlying criminal or civil litigation, in which the court must weigh the policy of the privilege against the particular litigation need of a party. Here, however, there is no underlying litigation; the "need" is Puerto Rico's assertion that the requested materials might be of aid to a criminal investigation. The United States also notes that the Department of Justice has already undertaken an investigation of the intervention and published a detailed report of its findings. Finally, in response to Puerto Rico's claim that failure to release the information would foreclose investigation of the officers, the United States emphasizes that federal officials are generally immune from state prosecution for actions performed within

the scope of their official duties, and thus the privilege would merely reflect an existing immunity.

With respect to this last point, the contentions of the parties deserve some elaboration. Courts have explained that "Supremacy Clause immunity governs the extent to which states may impose civil or criminal liability on federal officials for alleged violations of state law committed in the course of their federal duties." *Wyoming v. Livingston,* 443 F.3d 1211, 1213 (10th Cir.2006). Such disputes "permit of no easy answers," but "the supremacy of federal law precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority." *Id.* Thus, federal officials are generally granted Supremacy Clause immunity from state prosecution for actions taken in the course of their official duties. *See, e.g., In re Neagle,* 135 U.S. 1, 75, 10 S.Ct. 658, 34 L.Ed. 55 (1890) (U.S. Marshal immune from state murder prosecution); *Livingston,* 443 F.3d 1211 (10th Cir.2006) (federal officials immune from state prosecution for trespass); *New York v. Tanella,* 374 F.3d 141, 142 (2d Cir.2004) (DEA agent who shot an unarmed suspect immune from state prosecution). However, such immunity is limited to actions that were "reasonably necessary for the performance of [the officials'] duties." *Livingston,* 443 F.3d at 1227-28. In the present situation, the privilege that the United States now asserts could conceivably extend beyond the scope of the immunity actually available to the officers if the privilege was

used to withhold information about acts not taken in the course of their official duties.

The sovereign interests at stake on both sides – Puerto Rico's interest in enforcing its criminal laws and the United States' interest in protecting the internal operations of the FBI – make our balancing of the interests particularly difficult in this case. We recognize that any decision will necessarily compromise one of these interests to some degree. On balance, however, we conclude that the FBI's decision not to release the requested materials was reasonable under the deferential standard of review prescribed by the APA. The FBI has a legitimate interest in maintaining the secrecy of sensitive law enforcement techniques.

We recognize that, in addition to general information about FBI protocols and techniques, Puerto Rico also has requested names and other personal information about individual FBI agents. Superficially, this identifying information seems distinct from information about FBI protocols and techniques involved in the shooting death of Ojeda. However, the individuals at issue are not suspected of criminal activity unrelated to the operation that implicates those protocols and investigative techniques. Obtaining this identifying information would allow Puerto Rico to interview the individuals in question. Inevitably, those interviews would involve inquiries relating to the FBI protocols and techniques that fall within the privilege.

Moreover, as the district court noted in its opinion, disclosing certain information about the agents "would reveal the number and types of personnel used by the FBI" to conduct operations such as the Ojeda intervention. If agents' names, official photographs and other personal information are made available, as requested by Puerto Rico, these agents will be less successful at conducting covert operations. Finally, courts have explained that "individuals, including government employees and officials, have privacy interests in the dissemination of their names. Public disclosure of the names of FBI agents and other law enforcement personnel . . . could subject them to embarrassment and harassment in the conduct of their official duties and personal affairs." *Massey v. FBI,* 3 F.3d 620, 624 (2d Cir.1993) (citation omitted) (upholding the nondisclosure of FBI agents' names under Exemption 7 of FOIA); *see also Jones v. FBI,* 41 F.3d 238, 246-47 (6th Cir.1994) (holding that "federal law enforcement officials 'have the right to be protected against public disclosure of their participation in law enforcement investigations'" (quoting *Ingle v. Dep't of Justice,* 698 F.2d 259, 269 (6th Cir.1983))); *Lesar v. U.S. Dep't of Justice,* 636 F.2d 472, 487 (D.C.Cir.1980) ("As several courts have recognized, [FBI] agents have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives.").

We acknowledge Puerto Rico's argument that the FBI's decision to withhold the information raises the

possibility that a federal agency may thwart state criminal proceedings against one of its own employees by refusing to disclose information that might lead to prosecution. That is a troubling possibility. As we have explained, although federal officials generally receive immunity from prosecution, such immunity obtains only when they are acting within the scope of official duties. The FBI's refusal to produce the requested materials may preclude a determination of whether the actions at issue here were within that scope.

However, other circumstances present here minimize the likelihood that wrongdoing was improperly concealed. First, the FBI acceded to some of Puerto Rico's requests for information, agreeing to allow Puerto Rico to inspect most of the physical evidence from the intervention and photographs of the premises taken before, during, and after the intervention. Moreover, the Office of the Inspector General ("OIG") – an entity entirely independent from the FBI – conducted a searching investigation of the events and made public a detailed two hundred page report of its findings. *See supra* note 12. In preparing the report, the OIG interviewed over sixty individuals, including all of the agents who planned, participated in, or had knowledge of the operation; reviewed thousands of pages of documents, including operation plans and orders, investigative files, intelligence reports, and FBI policies and procedures; reviewed forensic reports; and consulted with experts in tactical police operations. The report "identified a

number of deficiencies in the FBI's conduct of the Ojeda surveillance and arrest operation" and made "ten recommendations dealing with these findings"; however, it "did not conclude that any of the actions of FBI officials constituted misconduct." We acknowledge that these safeguards are an imperfect substitute for Puerto Rico's ability to obtain information to conduct its own investigation; however, the availability of this substitute reinforces our conclusion that the FBI's decision to withhold the other materials was not arbitrary.

In sum, we find no error in the FBI's refusal to release the information Puerto Rico requested in the Ojeda subpoena.

C. 444 de Diego Subpoena

Under the APA, a party must obtain a "final agency decision" prior to seeking judicial review of an agency action. 5 U.S.C. § 704; *Bennett v. Spear,* 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Here, Puerto Rico served the 444 de Diego subpoena on the FBI on February 20, 2006. The FBI then filed a motion to quash the subpoena on February 28. Puerto Rico contends that this motion to quash the 444 de Diego subpoena was the equivalent of a final agency action, while the United States asserts that it was not.

In its opinion ruling in favor of the United States, the district court held that no final agency action had taken place. It explained that, at the March 2 hearing

on the United States' motion to quash, Puerto Rico stated that "right now there is no intention to file any contempt proceedings" and that it "currently was going to be evaluating which is the next step in order to continue that investigation; if the step is administrative, if it is federal judicial or if it is state judicial." The district court then advised Puerto Rico that it must exhaust its administrative remedies and obtain a final agency action in order to file suit. Puerto Rico's next action, however, was to file the complaint in this action on March 23. Consequently, the district court explained that Puerto Rico "has not submitted anything into the record indicating that the government made a final decision," implicitly holding that the motion to quash could not itself constitute a final agency action, and thus no final agency action had taken place.

The issue of whether the United States' motion to quash the subpoena was final agency action is a thorny one. Courts have held that "an agency's refusal to comply with a subpoena constitutes 'final agency action . . . ripe for . . . review under the APA.' "*Yousuf v. Samantar,* 451 F.3d 248, 251 (D.C.Cir.2006) (quoting *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 275 (4th Cir.1999)). Indeed, in *United States v. Williams,* 170 F.3d 431, 434 n. 4 (4th Cir.1999), "the government asserted and [the party requesting information] did not dispute that the United States Attorney's response to a subpoena constitutes final agency action for purposes of the APA." No court has held, however, that filing a motion to quash is the

equivalent of a refusal to comply. Moreover, at the hearing on the motion to quash, Puerto Rico's acknowledgment that it was exploring other avenues of obtaining the materials it had requested, including administrative avenues, suggests that Puerto Rico itself did not believe that it had obtained final agency action.

The issue of whether there was final agency action implicates the jurisdiction of the federal courts, and such final action is normally a prerequisite to judicial review. *Cobell v. Kempthorne,* 455 F.3d 301, 304 (D.C.Cir.2006). However, we have held that cases exist in which we may exercise "hypothetical jurisdiction" – that is, cases "in which we may – and should – bypass the jurisdictional question" because the jurisdictional issue is complex but the outcome on the merits is straightforward. *See, e.g., Royal Siam Corp. v. Chertoff,* 484 F.3d 139, 141 (1st Cir.2007). In exercising such hypothetical jurisdiction, "we have distinguished between Article III jurisdiction (which may never be bypassed) and statutory jurisdiction (which may occasionally be bypassed)." *Id.* Here, the question of whether there has been final agency action is one that implicates statutory, rather than constitutional, jurisdiction. *See Air Brake Systems, Inc. v. Mineta,* 357 F.3d 632, 638 (6th Cir.2004) ("[T]he jurisdictional question here is one of statutory interpretation: [was there] 'final' agency action for which no other adequate judicial remedy exists?"); *Ciba-Geigy Corp. v. EPA,* 801 F.2d 430, 442 (D.C.Cir.1986) (discussing "the statutory jurisdictional issue of

whether [there was] 'final agency action'"). Thus, given the difficulty of the jurisdictional issue here, we conclude that it is appropriate to bypass that issue and proceed to the more straightforward task of resolving the merits.

The materials requested by Puerto Rico in the 444 de Diego subpoena are substantially similar to the materials already discussed with respect to the Ojeda subpoena: (1) the name, rank, division, address, and telephone number of two FBI agents; (2) an official photograph of each of the two FBI agents; and (3) internal FBI protocols relating to the use of force and pepper spray. These materials fall within the scope of the law enforcement privilege for the same reasons that the names and personal information of FBI agents and the internal FBI protocols requested in the Ojeda subpoena fell within that privilege, and Puerto Rico has offered no more compelling reasons for disclosure in the case of the materials requested in the 444 de Diego subpoena. Thus, assuming that Puerto Rico obtained final agency action with respect to its request for these materials, the FBI was neither arbitrary nor capricious in withholding such information.

V.

After careful review, we conclude that Puerto Rico cannot assert a nonstatutory cause of action, grounded in its constitutional sovereign authority to enforce its criminal laws, to obtain the materials it

seeks. Instead, we find Puerto Rico's request for these materials subject to review under the APA. Moreover, we hold that a qualified privilege applies to the law enforcement materials Puerto Rico has requested here: sensitive law enforcement protocols and techniques and the names and other personal information of the FBI agents involved in the two operations. In light of this privilege and the applicable *Touhy* regulations, we conclude that the FBI's response to the Ojeda subpoena and the 444 de Diego subpoena was neither arbitrary nor capricious. Thus, the judgment of the district court is *affirmed.*

So ordered.

BOUDIN, Chief Judge, concurring.

It has been long settled that the United States cannot be sued, either in federal court or in any state forum, unless it has waived sovereign immunity. *Lehman v. Nakshian,* 453 U.S. 156, 160, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). States and comparable entities are treated no differently than any other litigant. Indeed, the lower courts have repeatedly held that, absent a waiver, the United States cannot be forced to obey a subpoena issued by a state court, state grand jury, or state legislative committee.[14]

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[14] *See, e.g., United States v. Williams,* 170 F.3d 431, 433 (4th Cir.), *cert. denied,*525 U.S. 854, 120 S.Ct. 135, 145 L.Ed.2d 115 (1999); *In re Elko County Grand Jury,* 109 F.3d 554, 556 (9th Cir.), *cert. denied,* 522 U.S. 1027, 118 S.Ct. 625, 139 L.Ed.2d 606 (1997) (sovereign immunity bars enforcement of state grand jury

(Continued on following page)

Puerto Rico's lawsuit in federal court, seeking to enforce the state's demand for a turnover of documents and exhibits belonging to or in the custody of the FBI, is itself barred by sovereign immunity unless it falls within an exception – which normally must be created by Congress. This is not an instance of discovery in aid of a federal lawsuit to which the United States has otherwise consented (*e.g.*, a Tucker Act suit against the United States) or to which it is otherwise susceptible to discovery (*e.g.*, a federal criminal prosecution).

So far as Puerto Rico is asserting an implied exception to federal sovereign immunity for state criminal investigations, the proposition is without case support and is at odds with a catalogue of cases. *See* note 14, *above*. Puerto Rico is free to conduct criminal investigations. It is not free to bring a federal or state lawsuit to obtain by court process, at the behest of a state agency, documents and exhibits controlled by the United States, unless Congress has so provided.

The United States has waived sovereign immunity in a number of different statutes, including the

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subpoena of federal official); *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 (D.C.Cir.1996); *State of La. v. Sparks*, 978 F.2d 226, 234-35 (5th Cir.1992); *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir.1989); *United States v. McLeod*, 385 F.2d 734, 751 (5th Cir.1967); *United States v. Owlett*, 15 F.Supp. 736, 742 (M.D.Pa.1936).

Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2000) (certain torts), the Tucker Act, *id.* § 1346(a) (contracts), and the Freedom of Information Act, 5 U.S.C. § 552 (2000) (access to many documents). Puerto Rico does not invoke the FOIA, presumably because one of its exceptions limits requests for criminal investigative materials.[15] 5 U.S.C. § 552.

This leaves Puerto Rico with the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The APA can be viewed both as a residual waiver of sovereign immunity permitting judicial review of federal action – though not an award of damages – where there is no other prescribed remedy; and as a federal cause of action where an agency acts contrary to law or in a manner that is arbitrary or irrational (unless the matter is one committed to agency discretion by law, *id.* § 701(a)(2)). *See* H.R. Rep. 94-1656, at 4-12 (1976).

Puerto Rico points to no law requiring the turnover of the materials it seeks. So far as Puerto Rico

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[15] The Freedom of Information Act excepts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, . . . (D) could reasonably be expected to disclose the identity of a confidential source . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7).

asserts its own sovereign interest in law enforcement, this interest creates no cause of action – state or federal – that permits Puerto Rico to constrain the United States. *See* U.S. Const. Art. VI, cl. 2; *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 436, 4 L.Ed. 579 (1819) ("the states have no power . . . to retard, impede, burden, or . . . control" the execution of federal powers); *cf. In re Neagle,* 135 U.S. 1, 75, 10 S.Ct. 658, 34 L.Ed. 55 (1890).

Congress has authorized each agency to create housekeeping regulations governing the use of its "records, papers, and property," 5 U.S.C. § 301, and the Department's pertinent regulations forbid disclosure of any information where [d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

> unless the "administration of justice requires disclosure." 28 C.F.R. § 16.26(b)(5), (c). Yet the Department's regulations, by their explicit terms, create no substantive rights in litigants, 28 C.F.R. § 16.21(d), and so create no legal obligation enforceable under the APA.

This leaves Puerto Rico, at best, with an APA suit to challenge agency action as arbitrary and capricious. Some courts have recognized an action under

the APA to challenge the reasonableness of the agency's action in withholding documents.[16] Whether this is a plausible claim – given the explicit treatment of document requests under the FOIA – might be debated. But the present case would turn out the same way even if such an APA claim survived the precept *lex specialis derogat legi generali. In re Lazarus,* 478 F.3d 12, 19 (1st Cir.2007).

There is nothing arbitrary or capricious about the Department's policy of refusing to reveal "records compiled for law enforcement purposes" that would "disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26. The Department's legitimate interest is self-evident and is reflected in both the FOIA categorical exception, *see* note 15, *above,* and in judicial recognition of a law enforcement privilege, *Roviaro v. United States,* 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

Nor did the Department act arbitrarily or capriciously in applying its general policy in this case. As the district court found, the materials sought by

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[16] "If the agency refuses to produce the requested documents, the sole remedy for the state-court litigant is to file a collateral action in federal court under the APA." *Houston Bus. Journal,* 86 F.3d at 1212. *See also COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 274 (4th Cir.1999); *Williams,* 170 F.3d at 434; *Edwards v. U.S. Dep't of Justice,* 43 F.3d 312, 316-17 (7th Cir.1994); *Boron Oil,* 873 F.2d at 71; *cf. Gen. Elec.,* 197 F.3d at 598-99, *modified on reh'g,* 212 F.3d at 690.

Puerto Rico and withheld by the Department would reveal the identities of FBI agents, "how the FBI goes about capturing a fugitive who is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of law enforcement settings, and the way in which law enforcement information is gathered."[17]

That in this case the materials might be protected under the federal law enforcement privilege is icing on the cake, but the Department's action would be reasonable even without the privilege. When the United States tries a defendant in its own courts, no issue of sovereign immunity is presented: disclosure obligations depend on federal criminal rules and precedents and, ordinarily, material in government hands must be produced in response to such requirements or a defense subpoena *unless* privileged.

By contrast, when Puerto Rico is seeking materials in an action not otherwise properly in federal court, the United States has no independent obligation to turn over government materials regardless of

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[17] These materials included the "operation order" relating to the FBI raid on Ojeda's residence; the identities and photographs of the agents involved in the raid and those responsible for using pepper spray; information gathered during the FBI's occupation of Ojeda's residence; copies of expert reports, photographs, and recordings related to the raid; and internal protocols concerning violent and arrest interventions and use of force.

whether they are privileged; at most, it must avoid action that is arbitrary and capricious and can do so on the basis of a reasonable general policy. The Department's refusal to release the information in this case was not arbitrary and capricious and that is the end of the matter.

SHADUR, District Judge, concurring.

In this instance the thoughtful opinions by Judge Lipez and Chief Judge Boudin put me in mind of the old saw about the politician who says of a controversial issue, "Some of my friends are in favor of X, and some of my friends are in favor of Y, and I'm in favor of my friends." Both opinions reach the same destination, albeit by different routes, and at the end of the day I share their common conclusion that the Commonwealth's legitimate interest in pursuing a possible criminal prosecution cannot override the legitimate policy concerns of the United States, as the ultimate sovereign, in not unduly exposing its own law enforcement techniques and personnel against its wishes.

In that respect Congress has permissibly acted to limit judicial review of those policy concerns to the standards applicable under the APA, and the Commonwealth has not surmounted the high hurdle that statute prescribes. Hence I concur in the conclusion reached in each of the two opinions.

United States Court of Appeals
For the First Circuit

No. 06-2449

COMMONWEALTH OF PUERTO RICO,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA;
ALBERTO R. GONZALES, Attorney General;
ROBERT MUELLER, Director of the FBI;
ROSA EMILIA RODRIGUEZ-VÉLEZ, U.S. Attorney
for the District of Puerto Rico; and
LUIS S. FRATICELLI, Special Agent
in Charge of the FBI in Puerto Rico,

Defendants, Appellees.

JUDGMENT

Entered: June 15, 2007

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Certified and issued as Mandate
under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

/s/ CMP
Deputy Clerk

Date: 9/13/07

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

[cc: Mr. Roig Colon, Mr. Antonetti-Stutts, Mr. Pamias Velaquez, Mr. Melendez, Mr. Sanchez-Ramos, Mr. Fernandez-Torres, Mr. Stern, Ms. Klein, Mr. Perez-Sosa, Ms. Rodriguez-Velez & Mr. Cohn.]

2006 WL 2795576

United States District Court, D. Puerto Rico.
COMMONWEALTH OF PUERTO RICO, Plaintiff
v.
UNITED STATES of America, et al., Defendants.
Civil Nos. 06-1305 (JAF), 06-1306(JAF).
Related to Misc. No. 06-049 (JAF).

Sept. 26, 2006.

Jorge R. Roig-Colon, P.R. Department of Justice – Federal Litigation, Kenneth Pamias-Velazquez, Department of Justice of P.R., San Juan, PR, for Plaintiff.

Miguel A. Fernandez-Torres, United States Attorney's Office, San Juan, PR, for Defendants.

OPINION AND ORDER

JOSÉ ANTONIO FUSTÉ, Chief District Judge.

I.

Background

Plaintiff, the Commonwealth of Puerto Rico, brings this action against the following Defendants: (1) the United States of America; (2) Alberto R. Gonzales, in his official capacity as the United States Attorney General; (3) Robert Mueller, in his official capacity as the Director of the Federal Bureau of Investigations (FBI); (4) Rosa Emilia Rodríguez-Vélez, in her capacity as the United States Attorney

for the District of Puerto Rico;[1] and (5) Luis S. Fraticelli, in his official capacity as Special Agent in Charge of the FBI in Puerto Rico, asking this court: (a) to declare Defendants' refusal to disclose Department of Justice (DOJ) agency records pertaining to two controversial FBI operations as violative of the housekeeping statute, 5 U.S.C. § 301 (1996 & Supp.2006), regulations promulgated by DOJ pursuant to the housekeeping statute, 28 C.F.R. §§ 16.21-16.29, and its sovereign right to pass and enforce criminal laws as established in the United States Constitution; and (b) to permanently enjoin Defendants from withholding any information that Plaintiff requests pertaining to two FBI operations. *Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1.* Defendants move to dismiss Plaintiff's complaint, arguing that Plaintiff fails to state claims upon which relief can be granted because the federal government has properly invoked a privilege recognized by the housekeeping statute and related DOJ regulations that protect agency records from disclosure when their release would reveal sensitive law enforcement investigative techniques. *Docket Document Nos. 23, 25.* Plaintiff opposes Defendants' motion, *Docket Document No. 29,* and moves for summary judgment in its favor. *Docket Document No. 30.* Defendants oppose Plaintiff's summary judgment

[1] Humberto S. García originally appeared in the caption of this case, and will be referred to throughout, as the United States Attorney for the District of Puerto Rico. He retired, however, and has been succeeded by Rodríguez.

motion, *Docket Document No. 32,* and reply to Plaintiff's opposition to their motion to dismiss. *Docket Document No. 35.*

Plaintiff's complaint is divided into five causes of action. *Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1.* We grant Defendants' motion to dismiss as to Plaintiff's first four causes of action which, inter alia, challenge the constitutionality of the housekeeping statute and related DOJ regulations, question whether these laws recognize the law enforcement investigative technique privilege at all, and suggest that it is entitled to non-statutory judicial review of Defendants' decision to invoke the investigative techniques privilege. *Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1; See,* infra, sections IV.A, IV.B, IV.C. As to Plaintiff's fifth and final cause of action, which asks for judicial review of whether Defendants have correctly invoked the investigative techniques privilege to protect the records requested in this case under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. (1996 & Supp.2006), we also dismiss this, granting summary judgment in Defendants' favor. *Docket Document No. 1; Civ. No. 06-1306, Docket Document No. 1, See,* infra, section IV.D.

II.

Factual and Procedural Synopsis

This case concerns two information requests Plaintiff made of the federal government, and Defendants'

refusal to disclose all of the requested records. This factual summary is derived from the case records pertaining to two complaints filed by Plaintiff on March 23, 2006, one for each of the denied information requests. *Docket Document Nos. 1, 11, 23, 25, 26, 29, 30, 35, 37, 38.* Though these two complaints were originally assigned individual case numbers, they were consolidated under Civ. No. 06-1305 on March 24, 2006, because they presented near-identical legal issues. *Civ. No. 06-1306, Docket Document No. 7.*

A. *Ojeda Information Requests*

We gather the following factual background from papers and documents on file, as well as from the DOJ's Inspector General's Report on the Ojeda raid. *See* U.S. DOJ, Office of the Inspector General, A Review of the September 2005 Shooting Incident Involving the FBI and Filiberto Ojeda Ríos, August. 6, 2006, Available at: http://www.usdoj.gov/oig/special/s0608/full__report.pdf. The parties have referred to this document in their filings. *Docket Document Nos. 37, 38.* By making this statement of facts we do not claim that these facts are beyond controversy or that they have been definitively established.

Filiberto Ojeda-Ríos helped found the Macheteros, an organization that seeks to gain Puerto Rico's independence by armed struggle against the United States government, in the mid-1970s. In the years that followed, the Macheteros claimed responsibility for various murders and bombings around the island,

and have conducted robberies to finance their activities. One such robbery occurred on September 12, 1983, when the Macheteros stole $7.1 Million from a Wells Fargo facility in West Hartford, Connecticut; the theft was one of the largest bank robberies in U.S. history.

On August 30, 1985, while executing a warrant to arrest Ojeda in Puerto Rico, FBI agents received no response when they announced themselves at Ojeda's residence. Once the agents entered, however, Ojeda opened fire and shot one of the federal agents in the face, permanently blinding him in one eye. After a standoff, Ojeda was subdued by agents. Ojeda was first put on trial in Puerto Rico for assaulting the FBI agents during the arrest, and was acquitted. While out on bond pending final disposition and sentence in Connecticut for the bank robbery, Ojeda cut off his electronic monitoring device and skipped bail. Ojeda was sentenced for the bank robbery charge in Connecticut in 1992 in absentia.

Nearly fifteen years later, FBI intelligence revealed that Ojeda was living in Hormigueros, Puerto Rico, and the agency began an operation on or around September 23, 2006, to apprehend him. In the course of the FBI's raid of his estate, Ojeda opened fire and shot an agent in his abdomen. Another agent was also shot, but ultimately escaped injury because of his bullet-proof vest. Ojeda himself was shot. On orders from superiors in Washington, D.C., however, FBI agents did not enter the Ojeda residence until the

next day, by which time Ojeda had died from his injury.

Puerto Rico DOJ ("PRDOJ") almost immediately began an investigation into the Ojeda raid, and to that end, on October 4, 005, Defendant Fraticelli was served with a subpoena for the production of related information and objects. Michael Faries, Chief Division Counsel with the FBI in Puerto Rico, responded by letter to Pedro G. Goyco-Amador, Prosecutor General of the Commonwealth, on October 5, 2005, reminding him that DOJ regulations, 28 C.F.R. §§ 16.21-16.29, laid out specific requirements and procedures for requesting agency records. This regulatory framework, according to Faries, required Goyco to "furnish an affidavit or statement to the United States Attorney's Office, District of Puerto Rico," setting forth a summary of "the particular documents or testimony requested and their relevance to the proceedings" for which they are needed.

On October 7, 2005, Puerto Rico Attorney General Roberto J. Sánchez-Ramos sent the necessary affidavit to United States Attorney Humberto S. García in order to complete the Commonwealth's information request. In all, PRDOJ requested that the FBI produce twenty-three categories of information and materials. Among the items the PRDOJ demanded were: (1) a copy of the "Operation Order" relating to the FBI raid on Ojeda's residence; (2) the name, rank, division, address, and telephone number of every person who participated in, knew of, or took any decision regarding the operation; (3) nearly all

equipment, vehicles, and weapons involved in the raid; (4) information gathered during the FBI's occupation of Ojeda's property; (5) copies of expert reports, photographs, video and audio recordings relating to the FBI's raid; and (6) general protocols for violent and arrest interventions.

On October 17, 2005, García responded by letter to Sánchez that the FBI would not surrender any of the information, objects, and documents sought by the subpoenas, noting that DOJ regulations precluded disclosure when it "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26(b)(5) This, García wrote, was a "final agency decision which may be reviewed by the United States District Court."

In subsequent communications between García and Sánchez, however, García urged Sánchez not to worry that the FBI's decision necessarily rendered the requested objects and information undiscloseable in perpetuity. There were some items, for instance, García wrote in an October 21, 2005, letter to Sánchez, that could possibly be released "once [an investigation by the DOJ Office of the Inspector General] as well as other investigations are completed."

In response to the FBI's refusal to immediately produce information and objects, PRDOJ threatened judicial action in a letter dated November 2, 2005.

García wrote Sánchez again on November 9, 2005, indicating his frustration with PRDOJ's impatience. In that letter, though, García consented to permit PRDOJ access to examine certain items listed in its subpoena, including: (1) the bullet proof vests and helmets damaged during the intervention; (2) the weapons fired in the intervention; (3) the vehicle used to enter Ojeda's residence; and (4) the photographs taken before, during, and after the intervention. García conditioned Plaintiff's access to these items, however, on an FBI official's presence during inspection. García further insisted that the FBI would at all times retain official custody of the items and PRDOJ would have to share its conclusions with the Office of the Inspector General (OIG). As to the remaining items listed in the subpoena, García insisted that they remained undiscloseable. In the event that his attempts to compromise were insufficient, García reminded Plaintiff that the APA provided an opportunity for judicial review of the agency's decision.

Plaintiff accepted García's invitation to examine the vests, helmets, weapons, vehicle, and photographs. On January 20, 2006, however, Plaintiff issued another angry letter to García requesting that he produce additional agency records – contact information for "those individuals who can shed the most light into the chronology and nature of the events that transpired on the field during the intervention

with Mr. Ojeda Ríos, as well as regarding the key decisions concerning the manner and conduct of said intervention" – within one week, by January 27, 2006. On January 26, 2006, García sent Plaintiff a letter refusing this demand, referencing the gency's earlier and oft-repeated invocations of 28 C.F.R. § 16.26(b)(5).

Plaintiff filed a lawsuit in this court on March 23, 2006, seeking declaratory and injunctive relief from Defendants' refusal to release the requested records. *Civ. No. 06-1305, Docket Document No. 1.*

B. *444 De Diego Information Requests*

In the aftermath of the Ojeda raid, FBI agents retrieved information from his residence which was, in turn, used by the agency to help establish the probable cause necessary to obtain additional search warrants relating to their investigation of several specific criminal activities being planned by the Macheteros. As FBI agents executed one of these search warrants at a residential condominium located at 444 de Diego, in the Río Piedras area of San Juan, Puerto Rico, on February 10, 2006, a large group of protesters, reporters, and curious members of the general public clustered outside. Apparently, some of these citizens are claimed to have breached an established police line despite FBI agents' orders to the contrary. Eventually, an FBI agent used pepper spray to drive the surging public back behind what they understood was the police line.

Plaintiff began an investigation into these events, issuing subpoenas on February 17, 2006, against García and Fraticelli for the production of certain information, documents, and objects pertaining to the FBI's search of 444 de Diego. The subpoenas, which preemptively included an affidavit similar to the one required in the context of the Ojeda information request summarizing the documents requested and their relevance to the proceedings, ordered production of the requested materials by February 28, 2006. The three categories of requested materials were: (1) the name, rank, division, address, and telephone number of two FBI agents who allegedly used pepper spray and whose photos were attached to the subpoena; (2) official photographs of these two FBI agents; and (3) internal FBI protocols relating to the use of force and pepper spray.

Facing possible criminal contempt charges for failing to respond, García and Fraticelli filed a motion in this court to quash the subpoenas on February 28, 2006. *Misc. No. 06-49, Docket Document No. 1.* Plaintiff sent a letter to United States Attorney General Alberto Gonzales on March 1, 2006, asking for his help in getting the FBI to respond to the subpoenas. Plaintiff opposed García and Fraticelli's motion to quash the subpoenas on March 2, 2006. *Misc. No. 06-49, Docket Document No. 3.* We convened a hearing that same day, during which the federal government's lawyers reminded Plaintiff that it had to follow DOJ regulations, which meant pursuing an agency decision through the proper regulatory framework set

forth in 28 C.F.R. §§ 16.21-16.29, in order to properly requisition the records at issue. *Misc. No. 06-49, Docket Document No. 2.* Plaintiff indicated that it was evaluating other avenues to get information about the 444 de Diego search, and that it had no serious intention of enforcing the challenged subpoenas at that time. *Misc. No. 06-49, Memorandum Order, Docket Document No. 4.* Given this court's view that Plaintiff had "effectively mooted" the issue before it by disavowing an intent to enforce the subpoenas, we declined to rule on Plaintiff's motion to quash. *Id.*[2]

The next step Plaintiff took with respect to the 444 de Diego information request was to file the instant lawsuit on March 23, 006, seeking declaratory and injunctive relief from Defendants' failure to release the requested records. *Docket Document No. 1.*

C. *Cases Reassigned, Consolidated*

Plaintiff's complaint seeking Ojeda raid information was originally assigned to Judge Domínguez.

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[2] Much has been made by observers of the court process about the fact that our Memorandum Order of March 2, 2006, *Misc. No. 06-049, Docket Document No. 4,* made factual findings without receiving evidence. However, it is evident that that is not the case. Our factual narrative, like that in the present case, is open to precise substantiation if and when any of these controversies reach a trial on the merits. Ascribing any purpose to those narratives other than a simple informative background is totally misplaced.

Observing that it implicated many of the same legal issues as Misc. No. 06-49, an action over which the undersigned had retained jurisdiction, Judge Domínguez reassigned the case to the undersigned on March 24, 2006. *Docket Document No. 3.* That same day, and in recognition of the fact that Plaintiff's complaint seeking Ojeda raid information implicated the same legal issues as Plaintiff's complaint seeking 444 de Diego information, the undersigned consolidated those two actions into one. *Docket Document No. 6.*

Defendants moved to dismiss this case in its entirety on May 23, 006. *Docket Document Nos. 23, 25.* Plaintiff opposed the motion on June 7, 2006, *Docket Document No. 29,* and filed a motion for summary judgment that same day. *Docket Document No. 30.* Defendants opposed Plaintiff's summary judgment motion on June 20, 2006, *Docket Document No. 32,* and replied to Plaintiff's opposition to their motion to dismiss on June 28, 2006. *Docket Document No. 35.*

III.

Standards

A. *Motion to Dismiss Standard*

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action against h[illegible]n based solely on the pleadings for the plaintiff's "failure to state a claim upon which relief can be

granted." FED.R.CIV.P. 12(b)(6). In assessing a motion to dismiss, "we accept as true the factual averments of the complaint and draw all reasonable inferences therefrom in the plaintiffs' favor." *Educadores Puertorriqueños en Acción v. Hernández,* 367 F.3d 1, 62 (1st Cir.2004) (citing *LaChapelle v. Berkshire Life Ins. Co.,* F.3d 507, 508 (1st Cir.1998)); *see also Wash. Legal Found. v. Mass. Bar Found.,* 993 F.2d 962, 971 (1st Cir.1993). We then determine whether the plaintiff has stated a claim under which relief can be granted.

We note that a plaintiff must only satisfy the simple pleading requirements of Federal Rule of Civil Procedure 8(a) in order to survive a motion to dismiss. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 06 (2002); *Morales-Villalobos v. García-Llorens,* 316 F.3d 51, 52-53 (1st Cir.2003); *DM Research, Inc. v. Coll. of Am. Pathologists,* 170 F.3d 53, 55-56 (1st Cir.1999). A plaintiff need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," FED.R.CIV. P. 8(a)(2), and need only give the respondent fair notice of the nature of the claim and petitioner's basis for it. *Swierkiewicz,* 534 U.S. at 512-515. "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Id.* at 514 (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)).

B. *Summary Judgment Standard*

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. *Calero-Cerezo v. U.S. Dep't of Justice,* 355 F.3d 6, 19 (1st Cir.2004).

The moving party carries the burden of establishing that there is no genuine issue as to any material fact, though the burden "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The burden has two components: (1) an initial burden of production that shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion that always remains on the moving party. *Id.* at 331.

The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). Summary judgment exists "to pierce the boilerplate of the pleadings and assess the proof in order to

determine the need for trial." *Euromodas, Inc. v. Zanella,* 368 F.3d 11, 17 (1st Cir.004) (citing *Wynne v. Tufts Univ. Sch. of Med.,* 976 F.2d 791, 794 (1st Cir.1992)).

IV.

Legal Analysis

Defendants have refused to produce the documents Plaintiff requested pursuant to the housekeeping statute and the DOJ's Touhy regulations. Plaintiff's complaint challenging Defendants' decision alleges five causes of action, *Docket Document No. 1,* and we shall analyze each of these in turn.

A. *Do the Housekeeping Statute or the Touhy Regulations Create a Substantive Privilege to Protect DOJ Information?*

Plaintiff's first and second causes of action claim entitlement to declaratory and injunctive relief ordering Defendants to produce all requested information, objects, and documents ("information"). First, Plaintiff argues that the housekeeping statute, 5 U.S.C. § 301, does not create or authorize DOJ to create through regulations, any independent privileges that could preclude disclosure of agency records. *Docket Document No. 1.* Alternatively, Plaintiff argues that, even if it were legitimate for Defendants to invoke such a privilege to protect agency records generally, the DOJ's *Touhy* regulations, 28 C.F.R. §§ 16.21-16.29, explicitly bar Defendants from applying the

privilege to a request for DOJ records made by Commonwealth law enforcement officials. *Id.*

According to the Supreme Court, housekeeping statutes have enjoyed a "long and relatively uncontroversial history" of "grant[ing] authority to the agency to regulate its own affairs." *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979). Indeed, their roots "go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal department affairs." *Id.*; *see also* Act of July 27, 1789, ch.4 1 Stat. 29 (Department of Foreign Affairs); Act of August. 27, 1789, ch. 7, 1 Stat. 50 (Department of War) ("[T]he Secretary for the department . . . shall . . . be entitled to have the custody and charge of all records, books and papers . . .). The modern-day housekeeping statute – the statute at issue in this case – was last amended in 1958, and provides that:

> [t]he head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of his employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. . . .

U.S.C. § 301.

The DOJ, in accordance with its authority to manage its own records, has promulgated regulations outlining the procedure that must be followed when the agency or one of its employees receives a subpoena for

the "production or disclosure" of DOJ records. 28 C.F.R. § 16.21(a) ("This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department . . . [i]n all federal and state proceedings in which the United States is not a party . . . when a subpoena . . . is issued for such material . . . "). The DOJ regulations are commonly known as *Touhy* regulations after the 1951 Supreme Court case with the same name. In that case, *United States ex rel. v. Touhy,* a habeas petitioner subpoenaed FBI records pertaining to his conviction. 340 U.S. 462, 463-64 (1951). The Attorney General, acting pursuant to agency regulations placing such decision-making in his hands ("*Touhy* regulations"), ordered his subordinates not to respond to the subpoena. *Id.* at 464. The Supreme Court held that an FBI agent refusing to answer a subpoena under such circumstances could not be found guilty of contempt. *Id.* at 468. According to the Court, the Attorney General, as the centralized DOJ decision-maker for such information demands, could "validly withdraw from his subordinates the power to release department papers." *Id.* at 467. The *Touhy* Court further commented on the wisdom of regulations placing such agency determinations in the hands of one single person: "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether a subpoena duces tecum will be willingly obeyed or challenged is obvious." *Id.* at 468.

The DOJ's *Touhy* regulations hold that no agency employee "shall, in response to a demand, produce any material contained in the files of the Department." 28 C.F.R. § 16.22(a). Instead, the employee "shall immediately notify the U.S. Attorney for the district where the issuing authority is located." 28 C.F.R. § 16.22(b). When the subpoena seeks information other than oral testimony, the responding U.S. Attorney, in turn, "shall request a summary of the information sought and its relevance to the proceeding." 28 C.F.R. § 16.22(c).

The responding U.S. Attorney must then determine whether to release the requested records and may be required to collaborate in this regard with the custodian of the records at issue. 28 C.F.R. §§ 16.24(a), (b)(1), (d)(1), (f). Among the factors the U.S. Attorney must consider in deciding whether to make disclosures pursuant to a request is "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a)(2). The *Touhy* regulations further explain that "[a]mong the demands in response to which disclosure will not be made are those demands with respect to which . . . [d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26(b)(5). Plaintiff argues that *Touhy's* mention of this investigative technique privilege is improper, and that by extension, Defendants' invocation of the

investigative technique privilege to protect DOJ records is, therefore, also improper. *Docket Document Nos. 1, 11, 29.*

Plaintiff is correct insofar as it means to say that DOJ *Touhy* regulations do not themselves create privileges to protect information. In fact, in 1958, Congress amended 5 U.S.C. § 301 to explicitly emphasize that nothing in the statute itself, and, therefore, nothing in the *Touhy* regulations promulgated thereunder, may "authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301; *See also Chrysler Corp. v. Brown,* 441 U.S. 281, 310 (1979) (emphasizing that § 301 "is a 'housekeeping statute,' authorizing rules of agency organization, procedure, or practice, as opposed to 'substantive rules'"); *Kwan Fai Mak v. FBI,* 252 F.3d 1089, 1092 (9th Cir.001) ("[T]he regulations do not create an independent privilege authorizing the Department of Justice to withhold information. Nor could they, because the statutory authority for them, 5 U.S.C. § 301, makes clear [that they may not].") (quotations omitted); *Exxon Shipping Co. v. United States,* 34 F.3d 774, 776 (9th Cir.94) ("Section 301 does not, by its own force, authorize federal agency heads to withhold evidence sought under a valid federal subpoena.").

However, even though the housekeeping statute and the *Touhy* regulations do not themselves create substantive privileges, the federal government can invoke substantive privileges existing independently of those laws to protect information demanded

through the *Touhy* process. *See United States ex rel. Touhy v. Ragen,* 340 U.S. 462, 473 (1951) (J. Frankfurter, concurring) (noting, even though the issue was not before the Court, that "[i] t will of course be open to [the Attorney General] to raise those issues of privilege from testimonial compulsion"); *Exxon Shipping Co.,* 34 F.3d at 780 (recognizing that the federal government is "free to raise any possible claims of privilege from testimonial compulsion that may rightly be available to it"). As discussed, the DOJ's *Touhy* regulations permit the U.S. Attorney to consider "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege," 28 C.F.R. § 16.26(a)(2), and specifically mention that certain records may be sensitive because their disclosure may "interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." 28 C.F.R. § 16.26(b)(5). The mention of substantive privilege in the *Touhy* regulations, then, does not constitute regulatory creation of those substantive privileges, but rather regulatory recognition of their existence. We must, therefore, dismiss Plaintiff's claim that they are entitled to declaratory and injunctive relief in this case because of Plaintiff's belief that the housekeeping statute and the DOJ's *Touhy* regulations impermissibly create a privilege for Defendants to invoke to protect the requested records from disclosure.

Plaintiff alternatively argues that even if we find that privileges exist to protect agency records requested

through the *Touhy* process generally, *Touhy* regulations explicitly bar Defendants from invoking such privileges against information requests made by Commonwealth of Puerto Rico law enforcement. In support of this argument, Plaintiff cites a DOJ *Touhy* regulation that reads: "Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies." 28 C.F.R. 16.1(c).

There is a dearth of case law interpreting 28 C.F.R. § 16.21(c). It appears, however, that Plaintiff fails to state a claim for declaratory or injunctive relief thereunder because § 16.21(c)'s plain language does not establish what Plaintiff purports it does, i.e., a categorical rule that the DOJ can never withhold information from a state law enforcement agency. Section 16.21(c) states that the DOJ's *Touhy* regulations are not meant to impede the "appropriate disclosure" of agency records requested by federal, state, local, or foreign law enforcement agencies. If § 16.21(c)'s use of the word "appropriate" is to have any meaning – and we think that it must – then there must be instances where the DOJ's information disclosure to a fellow law enforcement agency would be appropriate as well as instances where the DOJ's information disclosure to a fellow law enforcement agency would be inappropriate. Thus, we find that Plaintiff has failed to establish valid claims for either of its first two causes of action.

B. *Does the Invocation of Privilege Under the Housekeeping Statute or the Touhy Regulations Unconstitutionally Abrogate Plaintiff's Sovereign Right to Enforce its Criminal Laws?*

Plaintiff's third cause of action alleges that Defendants' invocation of a substantive privilege to protect its records from disclosure constitutes an unconstitutional abrogation of Puerto Rico's sovereign right to enforce its criminal law. *Docket Document No. 1.* It is well established that "[f]oremost among the prerogatives of [State] sovereignty is the power to create and enforce a criminal code." *Heath v. Alabama,* 474 U.S. 82, 93 (1985). This authority even extends to federal agents who have committed criminal acts in circumstances where they are not protected by qualified immunity. *See United States ex rel. Drury v. Lewis,* 200 U.S. 1, 7 (1906) (holding that state could prosecute soldiers for murder when they allegedly unlawfully shot a suspect after he had surrendered); *but c.f. Cunningham v. Neagle,* 135 U.S. 1 (1890) (holding that a federal law enforcement agent enjoys Supremacy Clause immunity from state criminal prosecution when his violation of state law arises from reasonable execution of his official duties). There is, therefore, no question that Plaintiff is within its rights to criminally investigate a federal agent that it reasonably suspects may have committed a crime while acting outside the scope of his or her official duties. The subpoenas at issue in this case are allegedly incident to such an investigation, and we have no doubt that Defendants' refusal to comply

with the subpoenas makes that investigation more complicated.

Citing this complication, Plaintiff argues that Defendants' refusal to produce the requested documents in this case, made pursuant to the housekeeping statute and the *Touhy* regulations, unconstitutionally infringes upon Plaintiff's sovereign right to enforce its criminal laws. In support of its position, Plaintiff cites case law evincing two strands of Supreme Court doctrine regarding the balance of federal and state sovereignty. *Docket Document No. 11, 29.* The Court's holding in *United States v. Morrison,* for instance, supports a check on Congress when it attempts to claim powers specifically denied to it by the framers, such as a general police power superceding that of the states. 529 U.S. 598 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."). The Court's holding in *New York v. United States,* on the other hand, delimits the federal government's ability to forcibly commandeer state resources to achieve federal aims. 505 U.S. 144 (1992).

In *Morrison,* the Supreme Court invalidated a provision of the federal Violence Against Women Act (VAWA) establishing a civil remedy for victims of gender-motivated violence. 529 U.S. 598 (2000). Observing how attenuated gender-motivated violence's impact is on interstate commerce, the Court concluded that the VAWA provision is not a justifiable exercise of Congress' legislative authority under the Commerce Clause. *Id.* at 614-19. To rule otherwise,

according to the Court, would be "to obliterate the Constitution's distinction between national and local authority." *Id.* at 615. The housekeeping statute and the *Touhy* regulations, however, do not present the same risk. Instead, they set forth a procedural framework by which the federal government responds to information demands submitted to it by any interested party. We recognize that the federal government's claim of privilege in this case is frustrating for Plaintiff, but we simply do not see how it unconstitutionally intrudes upon Plaintiff's sovereign right to conduct criminal investigations. To be sure, it may make Plaintiff's criminal investigation more difficult than it might otherwise be, but the same may be said of other testimonial privileges recognized by the law.

Plaintiff also cites to *New York v. United States,* a case in which the Supreme Court invalidated a federal law requiring the states to either regulate their radioactive waste disposal or take title to it. 505 U.S. 144 (1992). Based on an analysis of the federalist principles embodied in Article I and the Tenth Amendment of the United States Constitution, the Court held that it was unconstitutional for the federal government to compel states to adopt legislative programs in order to further federal interests. *Id.* at 167-68 (explaining alternative, constitutional ways the federal government could achieve the same ends, e.g., by conditioning the receipt of federal funds on a state's willingness to craft desired regulations). "[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and

enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 176 (internal citations omitted). Taking the Court's holding into account, we fail to see, and Plaintiff fails to explain, how it applies to Defendants' refusal to release the requested information. It is unclear how Defendants' decision could run afoul of the Constitution when it does not compel Plaintiff to do anything at all.

Having concluded that Defendants' decision not to disclose agency records does not implicate Puerto Rico's sovereign right to enforce its criminal laws under the United States Constitution, we dismiss Plaintiff's third cause of action.

C. *Does the APA Govern the Judicial Review of Defendants' Decision Not to Release the Records Requested by Plaintiff?*

We must next consider whether the APA governs judicial review of Defendants' decision not to release its records. Plaintiff argues in its fourth cause of action that we should conduct non-statutory judicial review of Defendant's decision, and that the APA can apply only as an absolutely last resort. *Docket Document No. 1.* According to Defendants, however, their decision is subject to review only under the APA. *Docket Document No. 23.*

It was established, even before the APA was passed, that sovereign immunity does not bar suits

seeking non-statutory judicial review for non-monetary, specific relief against federal government officials where the officials' challenged actions are alleged to be unconstitutional or beyond their statutory authority. *Clark v. Library of Congress,* 750 F.2d 89, 102 (D.C.Cir.1984) (listing cases); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C.Cir.1996) (if a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action). Plaintiff presumably prefers non-statutory judicial review based on the hope that it might offer more liberal procedural requirements than the APA, and perhaps a more liberal judicial review standard. To proceed with an APA action in this case, for instance, Plaintiff would have to show that DOJ made a final agency decision with respect to its information requests. 5 U.S.C. § 704 ("Every agency action made reviewable by statute and every final agency action . . . shall be subject to judicial review."). Defendants do, in fact, contest whether Plaintiff has obtained such a final agency decision with respect to one of the information requests at issue in this case. *Docket Document No. 29*; *see* infra, section IV.D. Moreover, a successful APA action would hinge on whether DOJ's refusal to disclose the requested records was an "arbitrary and capricious" decision in light of housekeeping statute and *Touhy* regulation standards. 5 U.S.C. § 706(2)(A); *see infra,* section IV.D. This "arbitrary and capricious" judicial review standard is extremely deferential to the agency.

In support of its suggestion that judicial review of Defendants' decision to withhold records is not governed by the APA, Plaintiff refers us to *Leedom v. Kyne,* a Supreme Court case holding that a United States District Court had general jurisdiction to hear a lawsuit against the National Labor Relations Board for placing professional employees into a bargaining group with non-professional employees in clear violation of federal law, even though the NLRB's action was not eligible for any statutory judicial review. 358 U.S. 184, 190 (1958). If no judicial review were available under federal courts' general jurisdiction when the federal government acted to deprive rights in excess of its delegated powers, the Court reasoned, laws passed by Congress would be unenforceable and robbed of their vitality. *Id.*

Plaintiff also invokes a similar ruling by the First Circuit in *Rhode Island Department of Environmental Management v. United States* to further justify its position that its claim need not be under the APA and that it may proceed under the court's equitable powers and in the general federal jurisdiction of 28 U.S.C. § 1331. 304 F.3d 31 (1st Cir.2002). In that case, a Rhode Island state agency that had been haled before a federal administrative law judge (ALJ) argued that sovereign immunity protected it from defending itself in that federal forum. *Id.* at 39 n. 2. After the ALJ rejected the sovereign immunity argument, the state agency filed a federal lawsuit seeking judicial review, and the district court ruled in the state's favor. *Id.* at 36.

The First Circuit, while holding that the ALJ had never made a "final agency decision" reviewable by the district court under the APA, endorsed the district court's non-statutory judicial review of the ALJ's determination anyway, noting that the question of whether the state was protected by sovereign immunity would have otherwise remained ineligible for judicial review until after the ALJ entered a final decision in the administrative dispute, that is to say, until well after the state's sovereign interest in "prevent[ing] the indignity of [being] subject[ed] . . . to the coercive process of judicial tribunals" had already been compromised. *Id.* at 41 (internal quotations and citations omitted).

While *Leedom* and *Rhode Island* indeed present peculiar instances where non-statutory judicial review of agency action was permitted, they do not stand for the proposition that a United States District Court is authorized to allow non-statutory review whenever a party requests it. Rather, non-statutory judicial review of the kind seen in *Leedom* and *Rhode Island* is only available within "painstakingly delineated procedural boundaries." *See Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). Furthermore, the Supreme Court has set forth the factors that must be present to invoke non-statutory review. *Rhode Island*, 304 F.3d at 42-43. One factor that must be present is a showing that the denial of judicial review of a non-final agency decision would "wholly deprive the [party] of a meaningful and adequate means of vindicating its rights." *Bd. Of Governors of Fed. Reserve*

System v. Mcorp Fin. Inc., 502 U.S. 32, 43 (1991). It is this factor that was central to the Supreme Court's decision in *Leedom,* where the professional employees had no other recourse through which to obtain judicial review, and central to the First Circuit's decision in *Rhode Island,* where the state's sovereign immunity would not survive intact if it had been forced to wait to seek judicial intervention until the federal administrative proceeding had already run its course against it.

By contrast, there is no indication that denial of non-statutory review of Defendants' decision to withhold would deprive Plaintiff of a meaningful and adequate means of vindicating its rights. It is very clear Plaintiff has a means of vindicating its rights: Through the APA. *Kwan Fai Mak v. FBI,* 252 F.3d 1089, 1091 n. 5 (9th Cir.2001) ("[T]he proper procedure for the party seeking to compel disclosure in such circumstances is to file a separate action in federal court under the APA."); *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 271 (4th Cir.1999) ("[W]hen the government is not a party to the underlying action, an agency's refusal to comply with a subpoena must be reviewed under the standards established for final agency actions by the [APA] . . . "); *Smith v. Cromer,* 159 F.3d 875, 881 (4th Cir.1998) ("[The] remedy, if any, for the Justice Department's [refusal to release information] in the instant case may be found in the [APA] . . . "); *In re Elko County Grand Jury v. Siminoe,* 109 F.3d 554, 557 n. 1 (9th Cir.1997) ("The appropriate means for challenging [a

federal agency's] decision under *Touhy* is an action under the Administrative Procedure Act in federal court."). The APA expressly provides Plaintiff with a meaningful and adequate opportunity for judicial review of Defendants' action.

In addition, we disagree with Plaintiff's final argument regarding the inapplicability of the APA to the present case. Plaintiff cites to a footnote in *Exxon Shipping Co. v. United States Department of Interior,* which states that, in some instances, "APA proceedings can be costly, time-consuming, inconvenient to litigants, and may effectively eviscerate any right to the requested testimony." 34 F.3d 774, 780 n. 11 (9th Cir.1994) (internal quotations omitted) (citing to *In re Recalcitrant Witness,* 25 F.3d 761 (9th Cir.1994)). This argument is misplaced. The *Exxon Shipping Co.* footnote contemplates the potential inadequacy of the APA only in a limited circumstance; namely, when a plaintiff's access to a government witness' testimony would be precluded if forced to wait for an APA action to ripen. This narrow exception to the general rule that the APA governs review of all agency action does not apply to the case at hand. We, therefore, dismiss Plaintiff's fourth cause of action requesting non-statutory judicial review of Defendants' decision not to release the agency records requested in this case.

D. *Is Defendants' Decision Not to Release the Requested Records "Arbitrary and Capricious" Under the APA?*

The Administrative Procedure Act, which was first passed in 1946, sets forth rules by which agencies exercising congressionally delegated executive, legislative, and judicial powers execute those functions. *See* Steven P. Croley, The Administrative Procedure Act and Regulatory Reform: A Reconciliation, 10 ADMIN. L.J. AM. U. 35, 36 (1996). It also grants individuals the right to judicial review of agency action. 5 U.S.C. § 702. The original text of § 702 of the APA, the provision granting individuals the right to judicial review of agency action, provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." S.Rep. No. 94-996, pp. 19-20 (1976) (S.Rep.). A 1976 amendment to that law added language stating that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States . . . " 5 U.S.C. § 702. (1996 & Supp.2006). As amended, then, § 702 waives the federal government's sovereign immunity defense with regard to lawsuits seeking non-monetary relief for improper Federal administrative action. *Clark v. Library of Congress,* 750 F.2d 89,

102 (D.C.Cir.1984); *see also* David A. Webster, *Beyond Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 726 (1988) (discussing how courts have interpreted what constitutes a "non-monetary relief" lawsuit under § 702).

The scope of judicial review for agency action is set forth by § 706 of the APA, which states that the reviewing court may reverse an agency's action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[3] 5 U.S.C. § 706(2)(A) (1996 & Supp.2006). Judicial review is accordingly "severely limited," and courts are only free to determine whether the agency followed its own guidelines or committed a clear error of judgment." *Davis Enter. v. EPA*, 877 F.2d 1181, 1186 (3d

[3] Even if we were to determine that Defendants arbitrarily or capriciously misapplied DOJ's *Touhy* regulations, however, we are not entirely sure that the APA empowers us to compel release of the requested information in the present case, for the *Touhy* regulations make clear that they "are intended only to provide guidance for the internal operations of the Department of Justice, and [are] not intended to, and [do] not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States." 28 C.F.R. § 16.21(d); *Compare Smith v. Cromer*, 159 F.3d 875, 880 (4th Cir.1998) ("It is . . . incorrect to conclude that the Justice Department regulations, if properly 'complied' with, confer some entitlement on parties seeking the disclosure of agency records. The regulations do not purport to grant any right of access to applications."), *with Kasi v. Angelone*, 300 F.3d 487, 506 (4th Cir.2002) (stating that a district court may, under the APA, "compel the law enforcement agency to produce the requested information in appropriate cases").

Cir.1989). We may not substitute our own judgment for that of an agency. *Id.* at 1186.

A plaintiff may not seek substantive judicial review of an agency's decision until the contested agency decision is "final." 5 U.S.C. § 704 ("Every agency action made reviewable by statute and every final agency action ... shall be subject to judicial review."). The Supreme Court has held that an agency action is considered "final" only when the action signals the consummation of the agency's decisionmaking process and gives rise to legal consequences. *See Bennett v. Spear,* 520 U.S. 154, 156 (1997). Although Defendants concede that Plaintiff has secured a final decision with respect to its Ojeda information requests, Defendants argue that Plaintiff has not secured a final decision with respect to its 444 de Diego information request and, therefore, the Plaintiff's claim regarding the 444 de Diego request must be dismissed. *Docket Document No. 23.*

In fact, Plaintiff has not submitted anything into the record indicating that the government made a final decision on its demand with regard to its 444 de Diego requests. This is a bizarre procedural omission on Plaintiff's part, given that it was publicly advised during our March 2, 2006, hearing that it must follow the *Touhy* process in order to achieve a final agency decision. *Misc. No. 06-49, Docket Document No. 7.* Moreover, Plaintiff was obviously fully aware of this requirement from its experience making its Ojeda information requests. Rather than cure its procedural deficiencies, Plaintiff instead chose to simply file this

lawsuit three weeks later demanding access to the 444 de Diego records. Thus, because Plaintiff has failed to secure a final decision regarding the 444 de Diego information requests, we cannot move to the substantive merits of the government's withholding.

Plaintiff tries to wave away the procedural shortcomings of its 444 de Diego information requests in its summary judgment motion by pointing to a letter it received from the FBI's General Counsel, Valerie Caproni, on April 7, 2006, stating that "all matters pertaining to [the 444 de Diego information request] will be resolved by the District Court. It is the opinion of this office that no further action should be taken by the FBI pending such resolution." *Docket Document No. 30, Exh. 2.* Plaintiff argues that this letter constitutes final agency action and that the substantive merits of Defendants' refusal to release 444 de Diego information is, therefore, subject to judicial review under the APA. Plaintiff's invocation of Caproni's April 7, 2006, letter as a final agency decision reviewable under the APA is unacceptable, however, for Plaintiff filed its complaint against Defendants on March 23, 2006 – approximately two weeks before the Caproni letter was written. Ultimately, then, we find that Plaintiff's claim under the APA that the government improperly withheld the 444 de Diego information fails.

We now move to the last issue in this litigation, which is whether Defendants' decision to invoke the law enforcement investigatory techniques privilege against the disclosure of all requested Ojeda records

was arbitrary.[4] *Docket Document No. 25.* Defendants claim that the investigatory techniques privilege is the basis for withholding all requested Ojeda records. *Docket Document No. 25.* As discussed, Defendants concede that their refusal to release the Ojeda records is a final agency decision, and reviewing courts may reverse final agency decisions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706.

The investigatory techniques privilege is "based primarily on the harm to law enforcement efforts which might arise from public disclosure of . . . investigatory files." *United States v. Winner,* 641 F.2d 825, 831 (10th Cir.1981) (discussing how the Deputy Attorney General may invoke the law enforcement privilege to protect DOJ records from release in the context of a *Touhy* demand) (citing *Black v. Sheraton Corp.,* 564 F.2d 531 (D.C.Cir.1977)).

Defendants assert that the release of the Ojeda records that Plaintiff requested "would [reveal], inter alia, how the FBI goes about capturing a fugitive who

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[4] Defendants originally also invoked a privilege protecting law enforcement investigatory files from release when they could reveal sensitive information relating to an ongoing government investigation. *Docket Document No. 25.* On September 6, 2006, after the DOJ's Office of the Inspector General completed its investigation and issued an extensive report regarding the FBI operation to arrest Ojeda, Defendants indicated to this court that they would thereafter exclusively rely on the law enforcement privilege to protect the requested DOJ records from release. *Docket Document No. 38.*

is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of law enforcement settings, and the way in which law enforcement information is gathered." *Docket Document No. 25.* The records Plaintiff requested include the "operation order" relating to the attempt to apprehend Ojeda; detailed information about every person involved in the operation (including name, rank, and division); lists compiled during the operation; FBI organizational charts; and multiple internal protocols. It is easy to see from the nature of these records that they would reveal what Defendants claim they would reveal. We cannot, therefore, say that Defendants' strong interest in ensuring that such revealing information regarding sensitive investigative techniques remain confidential is arbitrary or capricious.

Pinpointing the government's strong interest in nondisclosure is only the first part of our review. The investigative techniques privilege is qualified in that the government's interest in nondisclosure must outweigh Plaintiff's need for access to the Ojeda information. *Black v. Sheraton Corp. of America,* 564 F.2d 531, 545 (D.C.Cir.1977); *United States v. Lilly,* 185 F.R.D. 113, 115 (D. Mass 1999) (citing *Cintolo,* 818 F.2d at 1002). Plaintiff's interest in the Ojeda records stems from its need for evidence to conduct a local investigation into whether federal agents are subject to criminal prosecution for their actions during the September 28, 2006, FBI raid during

which Ojeda was shot and killed. *Docket Document No. 28.* Defendants, however, aver that Plaintiff's interest in this regard has been greatly diluted by the fact that Plaintiff has presented no basis for believing that the incidents here fall into the rare class of cases where a state may prosecute a federal officer. *Docket Document No. 32.* Indeed, the DOJ's Office of the Inspector General has already conducted an extensive investigation into the federal agents' actions during the raid and published a 237-page report, available for public consumption, extensively detailing how the federal agents involved in the Ojeda raid acted within their authority and responsibility. *See* U.S. DOJ, Office of the Inspector General, A Review of the September 2005 Shooting Incident Involving the FBI and Filiberto Ojeda Ríos, August. 6, 2006, Available at: http://www.usdoj.gov/oig/special/s0608/full_report.pdf. We find that Defendants have not made a "clear error in judgment" by invoking the investigatory techniques privilege. *Davis,* 877 F.2d at 1186. Given that an extensive governmental investigation has already taken place reviewing and ultimately certifying the propriety of the federal agents' actions during the raid,[5] we cannot say that Defendants have arbitrarily discounted Plaintiff's need to access the Ojeda records and conduct yet another investigation. Thus, we conclude that the government's interest in protecting its investigative techniques is paramount in this case.

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[5] Prompted in part by a request by Puerto Rico Governor Aníbal Acevedo Vilá. *Docket Document No. 1, Exh. A.*

Indeed, the First Circuit has cautioned that where investigative techniques may be revealed, "the potential price to be paid by law enforcement is heavy, and should not be assessed without good reason." *United States v. Cintolo,* 818 F.2d 980, 1002 (1st Cir.1987).

Moreover, we are certain that today's result reaches the correct decision not only because compelled disclosure of Defendants' Ojeda records is not required under the law, but also because Defendants have shown themselves to be extremely reasonable in negotiating with Plaintiff to grant it as much access to the requested information as possible without compromising the government's interest in protecting its sensitive investigative techniques. Defendants have, for instance, granted Plaintiff substantial access to some of the requested information – the bullet proof vests and helmets damaged during the intervention, the weapons fired in the intervention, the vehicle used to enter Ojeda's residence, and the photographs taken before, during, and after the intervention – so long as Plaintiff's agents did not assume physical custody of the information, and so long as federal agents were present with Plaintiff's agents as they studied the information. *Civ. No. 06-1306, Docket Document No. 1, Exh. L.* This, we think, shows that Defendants have not unthinkingly, unyieldingly, or arbitrarily rejected Plaintiff's request for the records at issue but, rather, have made a measured effort to share as much information as possible with a state law enforcement agency without compromising the effectiveness of their techniques.

Plaintiff complains that Defendants have waived the investigative technique privilege and are, therefore, foreclosed from invoking it to protect the Ojeda information for the first time in the context of this litigation. *Docket Document No. 29.* We need not delve too deeply into this allegation, for it is simply not true. The case record contains letters from García, which were submitted to this court as attachments to Plaintiff's own complaint, repeatedly invoking the investigative technique privilege relied upon by the government in this case. *See Civ. No. 06-1306, Docket Document No. 1, Exhs. E, G.*

Plaintiff also argues that the investigatory technique privilege only exists to protect government information from criminals who might frustrate future government surveillance. *Docket Document No. 29.* Such concern, according to Plaintiff, is inapplicable in the present case given that it is a "sister law enforcement agency," and not a criminal. We think that Plaintiff's argument misapprehends that the investigative technique privilege does not only operate to prevent the release of sensitive agency records directly into the hands of a criminal, but also prevents any unrestricted dissemination of sensitive agency records to any person or entity in order to best protect the integrity and effectiveness of the agency's investigative practices. Indeed, Defendants have noted Puerto Rico officials' marked eagerness to talk to the press about the progress of its controversial information requests. *Civ. No. 06-1306, Docket Document No. 1, Ex. K.* Defendants' hesitance to release

sensitive records to Plaintiff is therefore well-founded, and we certainly cannot find it arbitrary.

Given our determination that Defendants have validly claimed the investigative techniques privilege to protect the Ojeda records in this case, we must deny Plaintiff's motion for summary judgment in its favor and grant summary judgment for Defendants. Although Defendants have not moved for summary judgment, we find it appropriate to grant relief to a nonmovant. *See Nat'l Expositions, Inc. v. Crowley Maritime Corp.*, 824 F.2d 131, 133 (1st Cir.1987) ("[A] district court has the legal power to render summary judgment . . . in favor of the party opposing a summary judgment motion even though he has made no formal cross-motion under rule 56."); 11 Moore's Federal Practice § 56.10[2][b] (Matthew Bender 3d ed.). Plaintiff's own position is that there is no genuine issue of material fact as to this issue, and Plaintiff had adequate opportunity to present related evidence in the context of its own summary judgment motion. With this dismissal of the balance of Plaintiff's fifth cause of action, no causes of action remain against the Defendants, and Plaintiff's complaint has been dismissed in its entirety.

V.

Conclusion

For the reasons stated herein, we **GRANT** Defendants' motion to dismiss as to Plaintiff's first four causes of action, **DENY** Plaintiff's summary

judgment motion as to the fifth, and, instead **GRANT** summary judgment to Defendants regarding Plaintiff's fifth cause of action. Judgment shall be entered accordingly.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

COMMONWEALTH OF PUERTO RICO, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants	Civil No. 06-1305 (JAF) Consolidated With: Civil No. 06-1306 (JAF) Related To: Misc. No. 06-049 (JAF)

JUDGMENT

(Filed Sept. 26, 2006)

On the basis of the terms and conditions of an Opinion and Order subscribed by the court today, judgment is entered dismissing the present consolidated cases in their entirety.

Miscellaneous Case No. 06-049 (JAF) shall also stand closed.

San Juan, Puerto Rico, this 26th day of September, 2006.

s/ José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF PUERTO RICO,
Plaintiff, Appellant,

v.

UNITED STATES of America; Alberto R. Gonzales, Attorney General; Robert Mueller, Director of the FBI; Rosa Emilia Rodriguez-Vélez, U.S. Attorney for the District of Puerto Rico; and Luis S. Fraticelli, Special Agent in Charge of the FBI in Puerto Rico,
Defendants, Appellees.

No. 06-2449.

(Filed Aug. 29, 2007)

ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard, Judge Milton I. Shadur* of the Northern District of Illinois, sitting by designation. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

FILED
FEB 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-685

In the Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Commonwealth of Puerto Rico may compel the federal government to provide it with information and materials concerning federal law enforcement operations, for the purpose of investigating those federal operations.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Black v. *Sheraton Corp. of Am.*, 564 F.2d 531 (D.C. Cir. 1977) 9
Exxon Shipping Co. v. *Department of the Interior*, 34 F.3d 774 (9th Cir. 1994) 8
Houston Bus. Journal, Inc. v. *Office of the Comptroller of the Currency*, 86 F.3d 1208 (D.C. Cir. 1996) 8
Linder v. *Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001) 8
Maryland v. *Soper*, 270 U.S. 36 (1926) 7
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) 9
United States v. *O'Neill*, 619 F.2d 222 (3d Cir. 1980) 10
United States ex rel. Touhy v. *Ragen*, 340 U.S. 462 (1951) 2

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 5
Freedom of Information Act, 5 U.S.C. 552 6
5 U.S.C. 552(b)(7) (1970) 9

Regulations and rule—Continued: Page

28 C.F.R.:
Sections 16.21 *et seq.* 2
Section 16.22(a) 2
Section 16.26(b) 2
Section 16.26(b)(5) 2
Fed. R. Civ. P.:
Rule 45 8

In the Supreme Court of the United States

No. 07-685

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-49) is reported at 490 F.3d 50. The decision of the district court (Pet. App. 52-92) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2007. A petition for rehearing was denied on August 29, 2007 (Pet. App. 94). The petition for a writ of certiorari was filed on November 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal agencies, including the Department of Justice (Department), have promulgated regulations that prohibit an agency employee from responding to a subpoena without agency permission. Such regulations

are known as *Touhy* regulations, a reference to this Court's decision upholding the validity of such regulations. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

The Department's current *Touhy* regulations, codified at 28 C.F.R. 16.21 *et seq.*, prohibit employees from producing material relating to their official duties without prior approval of the proper Justice Department official. 28 C.F.R. 16.22(a). The regulations set forth a non-exclusive list of instances in which approval should be denied, 28 C.F.R. 16.26(b), including instances in which "[d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired," 28 C.F.R. 16.26(b)(5).

2. This case arises out of the efforts of the Federal Bureau of Investigation (FBI) to apprehend a fugitive, Filiberto Ojeda Ríos (Ojeda). In the 1970s, Ojeda helped found the Macheteros, an organization that advocates independence for Puerto Rico through armed struggle against the United States government. Pet. App. 3. In 1983, the Macheteros stole $7.1 million from a bank in Connecticut. *Ibid.* When the FBI apprehended Ojeda in 1985, he shot an FBI agent in the face, permanently blinding the agent in one eye. *Ibid.* Following a trial in Puerto Rico, Ojeda was acquitted of assaulting the agent. *Ibid.* He skipped bail while on trial for bank robbery and was sentenced in absentia in 1992. *Ibid.* Fifteen years later, in September 2005, the FBI attempted to apprehend Ojeda at his residence in Hormigueros, Puerto Rico. *Ibid.* Ojeda shot two FBI agents and was fatally wounded. *Ibid.*

Based on information obtained from Ojeda's residence, the FBI obtained a search warrant for a residential condominium in San Juan, Puerto Rico. Pet. App. 5. When the FBI executed the search warrant in February 2006, a large group of protesters, reporters, and members of the public gathered outside. *Ibid.* Some of those individuals breached an established police line, and an FBI agent used pepper spray to keep people behind the line. *Ibid.*

The Commonwealth of Puerto Rico (Commonwealth) seeks to investigate those FBI operations. In October 2005, a Commonwealth prosecutor issued a subpoena pursuant to Puerto Rico law, directing the United States Attorney to produce materials including: (1) a copy of the "Operation Order" establishing the plan or rules of engagement for the FBI raid on Ojeda's residence; (2) the name, rank, division, address, and telephone number of every person who participated in, knew of, or made any decision regarding the operation, as well as an organizational diagram showing the rank of these individuals in the line of command; (3) various equipment, including but not limited to all bullet-proof vests, helmets, weapons, and vehicles involved in the raid; (4) any inventory of the property seized during the raid; (5) copies of any expert reports relating to the raid or Ojeda's death; and (6) copies of any relevant general FBI protocols, including those relating to violent interventions and potentially deadly force. Pet. App. 3-4. In subsequent correspondence, the Commonwealth stated that the requests related to a "criminal investigation" into Ojeda's death. *Id.* at 4.

The Commonwealth issued similar subpoenas demanding the production of materials pertaining to the FBI's execution of the search warrant in February 2006.

Pet. App. 5. The Commonwealth demanded: (1) the name, rank, division, address, and telephone number of the two FBI agents who allegedly used pepper spray; (2) official photographs of those agents; and (3) internal FBI protocols relating to the use of force and pepper spray. *Id.* at 5-6.

The FBI declined to produce the requested materials, explaining that the Department's *Touhy* regulations prohibit the disclosure of records compiled for law enforcement purposes. Pet. App. 4, 29. The FBI indicated, however, that Commonwealth prosecutors would be allowed to examine the bulletproof vests, helmets, weapons, and vehicles used during the raid and the photographs taken before, during, and after the raid, as long as the FBI retained official custody of the items and an FBI official was present during the inspection. *Id.* at 4-5.

3. The Commonwealth brought suit in district court, seeking a declaratory judgment that it has a right "to conduct a full investigation into the events leading to the death of Mr. Ojeda Rios," and an order "permanently enjoining Defendants from withholding any information relevant to the Commonwealth's investigation and ordering Defendants to comply with the Commonwealth's request and produce the subpoenaed information, objects, and documents." Pet. App. 6-7. The Commonwealth sought identical relief with respect to its "investigation into the events allegedly leading to the injury of members of the press and/or the public . . . on February 10, 2006, due to the alleged use of excessive force (including the alleged use of pepper spray) by FBI agents." *Id.* at 7.

The district court dismissed the complaints. Pet. App. 52-93. Noting the FBI's interest in maintaining

the confidentiality of sensitive law enforcement techniques, the court held that the FBI's decision to withhold materials relating to the Ojeda raid was not arbitrary or capricious under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 8. With respect to the subpoena relating to the execution of the search warrant, the court held that there had been no final agency action because the Commonwealth, which had indicated that it did not intend to enforce the subpoena, had failed to take steps to secure a final agency decision. *Id.* at 6, 84-85.

4. The court of appeals affirmed. Pet. App. 1-49. The court first rejected the Commonwealth's contention that its sovereign interests entitle it to pursue a "non-statutory" cause of action independent of the APA. *Id.* at 9-18. The court explained that, "when a state's interest in investigating the agents of a federal law enforcement entity arguably conflicts with that federal entity's need to protect certain information relating to law enforcement activities, Congress has provided a mechanism—the APA—for resolving these conflicts." *Id.* at 17.

With respect to both subpoenas, the court of appeals determined that the FBI had acted reasonably in declining to produce its sensitive law enforcement materials. Pet. App. 18-43. The court explained that disclosure of the materials pertaining to the Ojeda raid "would reveal how the FBI goes about capturing a fugitive who is believed to be dangerous, the number and types of personnel used by the FBI in such operations, the way the FBI collects evidence, the FBI's internal operating procedures in a variety of law enforcement settings, and the way in which law enforcement information is gathered." *Id.* at 33 (quotation marks omitted). It explained that

disclosure of the names and other personal information concerning individual FBI agents would jeopardize the agents' ability to conduct covert operations and expose the agents to harassment. *Id.* at 36-37, 42. The court concluded that the FBI's interest in maintaining the secrecy of its law enforcement materials was not overcome by the Commonwealth's interest in investigating the FBI's operations. *Id.* at 37-39.[1]

Concurring, Chief Judge Boudin noted that, because the APA provides the only relevant waiver of sovereign immunity, and no law requires the disclosure of the documents that the Commonwealth seeks, the Commonwealth has, "at best, * * * an APA suit to challenge agency action as arbitrary and capricious." Pet. App. 43-46. He explained that, while the Commonwealth "is free to conduct criminal investigations," it "is not free to bring a federal or state lawsuit to obtain by court process, at the behest of a state agency, documents and exhibits controlled by the United States, unless Congress has so provided." *Id.* at 44. Chief Judge Boudin observed that the FBI's interest in withholding law enforcement materials "is self-evident and is reflected in both the [Freedom of Information Act (FOIA), 5 U.S.C. 552] categorical exemption [for law enforcement records] * * * and in judicial recognition of a law enforcement privilege." *Id.* at 47.

Senior District Judge Shadur, sitting by designation, also concurred, noting that "the Commonwealth's legitimate interest in pursuing a possible criminal prosecution cannot override the legitimate policy concerns of the United States, as the ultimate sovereign, in not un-

[1] The court of appeals assumed, without deciding, that there was final agency action with respect to the subpoena pertaining to the execution of the search warrant. Pet. App. 39-42.

duly exposing its own law enforcement techniques and personnel against its wishes." Pet. App. 49.

5. The court of appeals denied the Commonwealth's petition for rehearing and rehearing en banc without recorded dissent. Pet. App. 94.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. The Commonwealth contends (Pet. 21-30) that the FBI's decision to withhold its sensitive law enforcement materials should have been subject to de novo review, rather than deferential review under the APA. As the court of appeals held, however, the APA, including its arbitrary-and-capricious standard of review, provides the only potential basis for review. Pet. App. 12-18; *id.* at 44-46 (Boudin, C.J., concurring). The Commonwealth's asserted "nonstatutory" cause of action (Pet. 25) simply does not exist. As Chief Judge Boudin explained, the Commonwealth "is free to conduct criminal investigations," but "[i]t is not free to bring a federal or state lawsuit to obtain by court process, at the behest of a state agency, documents and exhibits controlled by the United States, unless Congress has so provided." Pet. App. 44. Here, the APA contains the only applicable cause of action and waiver of sovereign immunity.[2]

---

[2] The Commonwealth's reliance (Pet. 17-18) on *Maryland* v. *Soper*, 270 U.S. 36 (1926), is misplaced. In *Soper*, federal employees testified voluntarily, of their own free will, in the course of a state investigation, and this Court upheld the state courts' jurisdiction to prosecute them for testifying falsely. *Id.* at 39-40, 43. *Soper* does not suggest, in any

Although the Commonwealth alleges (Pet. 21-26) a conflict among the circuits, the cases that it cites are inapposite because they concerned federal district court subpoenas that were governed by the Federal Rules of Civil Procedure. In both *Exxon Shipping Co.* v. *Department of the Interior*, 34 F.3d 774 (9th Cir. 1994), and *Linder* v. *Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), federal district courts issued subpoenas in connection with underlying litigation. *Exxon* held that such subpoenas are governed by the general discovery rules set forth in the Federal Rules of Civil Procedure. 34 F.3d at 779. *Linder* assumed, without deciding, that the federal government is a "person" within the meaning of Rule 45 of the Federal Rules of Civil Procedure, and it therefore applied Rule 45 standards to a subpoena served on federal agencies. 251 F.3d at 180-181.

By contrast, as the Commonwealth admits (Pet. 22 n.6), here there is no underlying litigation and no district court subpoena. Instead, the Puerto Rico Department of Justice purported to issue subpoenas pursuant to Puerto Rico law. See Pet. 9 n.2. The Federal Rules of Civil Procedure thus have no application to these subpoenas, rendering *Exxon* and *Linder* inapposite. Indeed, *Exxon* expressly distinguished the federal-court subpoena in that case from subpoenas issued by state courts. 34 F.3d at 778. In the circumstances of this case, therefore, if a federal agency declines to produce documents requested by a state prosecutor's subpoena, "the sole remedy * * * is to file a collateral action in federal court under the APA." Pet. App. 18-19 n.6 (quoting *Houston Bus. Journal, Inc.* v. *Office of the Comp-*

way, that the States (or Puerto Rico) may compel federal officials to testify or otherwise produce evidence for purposes of state or local investigations.

troller of the Currency, 86 F.3d 1208, 1211-1212 (D.C. Cir. 1996)).

2. The Commonwealth alternatively contends (Pet. 31-38) that the court of appeals erred in determining that the FBI reasonably withheld the law enforcement materials sought by the Commonwealth. That fact-bound issue does not warrant this Court's review. The decision below does not conflict with any decision of another court of appeals and, indeed, it appears that the issue has never arisen before. See Pet. App. 2 (noting that this case presents "a novel question").

In any event, the decision below is correct. There can be no doubt that the materials sought by the Commonwealth are protected by the law enforcement privilege. This privilege, which is "rooted in common sense as well as common law," recognizes that "law enforcement operations cannot be effective if conducted in full public view." Pet. App. 23 (quoting *Black* v. *Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977)). Congress itself "recognized the necessity for such a privilege in the Freedom of Information Act," which exempts from disclosure documents whose production would "interfere with enforcement proceedings" or "endanger the life or physical safety of law enforcement personnel." *Black*, 564 F.2d at 546 & n.9 (quoting 5 U.S.C. 552(b)(7) (1970)). As this Court has explained, in enacting the FOIA exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

Although the Commonwealth does not take issue with these established principles, it suggests (Pet. 35-37) that the federal government's interest in maintaining

the confidentiality of its law enforcement records must yield to the Commonwealth's interest in investigating the operations of the FBI. The Commonwealth declares that "[t]here is an anomaly in the assertion of a public interest 'privilege' by one governmental entity in order to keep information from another governmental entity that is itself invested with the authority 'to investigate in the public interest.'" Pet. 34 (quoting *United States* v. *O'Neill*, 619 F.2d 222, 230 (3d Cir. 1980)). But that argument inverts the principles of federal supremacy on which *O'Neill* rested. *O'Neill* declared that "[t]here is an anomaly in the assertion of a public interest 'privilege' *by the City* to justify withholding information *from a federal Commission* charged by Congress to investigate in the public interest the possible denial of equal protection by, inter alia, local governmental units." *O'Neill*, 619 F.2d at 230 (emphases added). That case provides no support for the Commonwealth's assertion of unconstrained power to investigate the operations of the federal government.

Finally, the court of appeals correctly determined that the Commonwealth's contention (Pet. 27) that the district should have conducted an *in camera* examination of the materials sought, undertaken an item-by-item balancing of the interests at stake, and considered measures such as a protective order, was not made to the district court and was therefore forfeited. Pet. App. 28-29, 30-31. Moreover, while the Commonwealth objects (Pet. 35) to "categorical" determinations of privilege, the Commonwealth itself made no attempt to differentiate among the materials, and instead sought a broad permanent injunction barring the federal government "from withholding any information relevant to the Commonwealth's investigation, and ordering Defendants to com-

ply with the Commonwealth's requests and produce the subpoenaed information, objects and documents." Pet. App. 6a-7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2008

94

(3)

RECORD AND BRIEFS

No. 07-685

In The

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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TABLE OF CONTENTS

Page

1. This Case Implicates a Constitutional Issue of Great National Importance 1

2. Certiorari Is Warranted to Clarify Whether a State's Sovereign Investigative Power Is Subject to the Deferential Standards of the Administrative Procedure Act 3

3. Certiorari Is Warranted to Clarify the Scope and Application of the Law Enforcement Privilege 7

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999).....9

Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc., 502 U.S. 32 (1991).....7

Black v. Sheraton Corp. of Am., 564 F.2d 531 (D.C. Cir. 1977).....8

Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines & Tech., 12 F.3d 737 (8th Cir. 1994).....5

Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991).....8

Dart v. United States, 848 F.2d 217 (D.C. Cir. 1988).....5

Dellwood Farms, Inc. v. Cargill, 128 F.3d 1122 (1997).....8

Exxon Shipping Co. v. U.S. Dep't of the Interior, 34 F.3d 774 (9th Cir. 1994).....5, 6

Hemstreet v. Duncan, No. CV-07-732-ST, 2007 WL 4287602 at *3 (D. Or. Dec. 4, 2007).....8

In re U.S. Dep't of Homeland Sec., 459 F.3d 565 (5th Cir. 2006).....8

Linder v. Calero-Portocarrero, 251 F.3d 178 (D.C. Cir. 2001).....5, 6

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....4

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).....4

TABLE OF AUTHORITIES – Continued

Page

Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550 (11th Cir. 1985) 5

Resolution Trust Corp. v. Diamond, 773 F. Supp. 597 (S.D.N.Y. 1991) 10

Roviaro v. United States, 353 U.S. 53 (1957) 8

Specter v. Garrett, 995 F.2d 404 (3d Cir. 1993) 4

State of Maryland v. Soper, 270 U.S. 9 (1926) 3

State of Maryland v. Soper, 270 U.S. 36 (1926) 1, 2, 3

State of Maryland v. Soper, 270 U.S. 44 (1926) 3

Stefanelli v. Minard, 342 U.S. 117 (1951) 3

Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641 (9th Cir. 1998) 5

United States v. City of Detroit, 329 F.3d 515 (6th Cir. 2003) 5

United States v. O'Neill, 619 F.2d 222 (3d Cir. 1980) 9, 10

Up State Fed. Credit Union v. Walker, 198 F.3d 372 (2d Cir. 1999) 4

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) 4

CONSTITUTION OF THE UNITED STATES

Art. VI 10

TABLE OF AUTHORITIES – Continued

Page

LEGISLATION

Administrative Procedure Act

5 U.S.C. § 702 ..... 4, 6

5 U.S.C. § 706 6

RULES

Fed. R. Civ. P. 45 6

TREATISES

Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997) 4

Peter L. Strauss et al., *Gellhorn and Byse's Administrative Law* 1107 (10th rev. ed. 2003) 4

REPLY BRIEF FOR PETITIONER

1. This Case Implicates a Constitutional Issue of Great National Importance.

Respondents do not dispute that this case implicates a matter of national significance – namely, the authority of the several States in our constitutional system to investigate possible violations of their criminal laws. Nor do Respondents dispute that the decision below profoundly affects States' ability to exercise that authority. Nor, finally, do Respondents dispute the need for clarity about the scope and contours of that authority.

Instead of directly contesting the significance of this case, Respondents appear to deny that this Court's precedents support any state investigative power over federal employees. In particular, they contend (BIO 7-8 n.2) that this Court's decision in *Maryland v. Soper*, 270 U.S. 36 (1926), "does not suggest, in any way, that the States (or Puerto Rico) may compel federal officials to testify or otherwise produce evidence for purposes of state or local investigations." That statement both mischaracterizes this case and misunderstands *Soper*.

The present proceeding is not an attempt by the Commonwealth to use its own sovereign power directly to "compel" testimony or the production of evidence. Rather, it is an invocation of *the federal courts'* power to direct the production of evidence bearing on possible violations of Puerto Rico law. The Commonwealth readily acknowledges that its suit is

subject to the constraints of federal law, including the Federal Rules of Civil Procedure and Evidence, the federal law of sovereign immunity, and the federal doctrine of "law enforcement privilege" (discussed at greater length in Point 3, *infra*).

Soper confirms that States have a right to evidence of the sort sought here, even when it is held in federal hands. *See Soper*, 270 U.S. at 42 (noting that "[t]he right of the state to inquire into suspected crime in its territory justifies the use of investigation by its officers and the questioning of suspected persons under oath," including in that case the questioning of "federal officer[s] under suspicion"). The *Soper* Court also noted that the federal officers who had provided testimony in that case were not obliged to do so and could instead have "stood mute." *Id.* at 43. But that did not entail a wholesale denial of the State's sovereign authority in this area. Rather, the Court simply recognized that a State's power to investigate possible violations of its laws by federal employees is subject to the same limits that apply to its investigative powers generally, including the constitutional privilege against self-incrimination. Within those limits, *Soper* confirms that States have a "right" to use a variety of investigative methods "to inquire into suspected crime in [their] territory," even when doing so implicates the actions of federal officers. *Id.* at 42. As the Court explained in a later case, *Soper* provides "striking confirmation" that a State retains the power to "administ[er]" and "enforc[e] . . . its criminal law" even in cases "where an important countervailing

federal interest was involved." *Stefanelli v. Minard*, 342 U.S. 117, 120-21 (1951) (citing *State of Maryland v. Soper*, 270 U.S. 9 (1926); *State of Maryland v. Soper*, 270 U.S. 36 (1926); *State of Maryland v. Soper*, 270 U.S. 44 (1926)).

All agree that the States may prosecute federal officers for violating state criminal law. *See* Pet. 15-16 & n.4 (collecting statutes and case law reflecting and acknowledging this point). Yet the power to prosecute cannot be exercised responsibly if States are prevented from thoroughly investigating potential violations of their laws. Certiorari is thus warranted here to clarify the scope of the States' investigative "right[s]." *Soper*, 270 U.S. at 42.

2. Certiorari Is Warranted to Clarify Whether a State's Sovereign Investigative Power Is Subject to the Deferential Standards of the Administrative Procedure Act.

Because resolution of this case requires balancing the Commonwealth's sovereign interest in investigating possible violations of its laws against the Federal Bureau of Investigation's interest in withholding the relevant information and materials, the Commonwealth has sought de novo judicial review of the matter. Resolution of the Commonwealth's suit will ultimately require determining whether the information and materials it seeks are covered by the judicially-created law enforcement privilege. No federal agency has been delegated the authority to

administer that privilege. Thus, deferential "arbitrary and capricious" review under the Administrative Procedure Act (APA) is inappropriate. De novo "nonstatutory" review is in order.

Respondents' answer to this reasoning is to claim (BIO 7) that "[t]he Commonwealth's asserted 'nonstatutory' cause of action . . . simply does not exist." That contention overlooks the settled existence and function of nonstatutory review.

Nonstatutory review has a long and established history as a means of keeping government within the bounds of its lawful authority. It "has produced some of our most important opinions defining the legitimate scope of government action," including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Peter L. Strauss et al., *Gellhorn and Byse's Administrative Law* 1107 (10th rev. ed. 2003); *see also* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612 (1997).

The dominant view among the lower courts is that nonstatutory review survived the passage of the APA. Most circuits thus treat the APA's waiver of federal sovereign immunity from "action[s] seeking relief other than money damages," 5 U.S.C. § 702, as extending beyond suits brought under the APA itself. *See, e.g., Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999); *Specter v. Garrett*, 995

F.2d 404, 410 (3d Cir. 1993), *rev'd on other grounds*, 511 U.S. 462 (1994); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003); *Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines & Tech.*, 12 F.3d 737, 740 (8th Cir. 1994); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1555 (11th Cir. 1985); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988).

As explained in the Petition, however (*see* Pet. 21-26), there is disagreement among the circuits about whether suits to compel agency compliance with subpoenas may proceed as nonstatutory actions subject to de novo review. Respondents argue that the split is irrelevant here on the ground that the cases permitting non-APA review involved federal subpoenas governed by the Federal Rules of Civil Procedure. *See* BIO 8 (discussing *Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774 (9th Cir. 1994), and *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001)). Yet nothing in those cases suggests that their statements about nonstatutory review applied only to those narrow circumstances.

In *Exxon*, the Ninth Circuit "acknowledge[d] that collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate[ ]' any right to the requested testimony." 34 F.3d at 780 n.11 (alteration in original; citation omitted). Those considerations, the court reasoned, provided a "compelling" case for nonstatutory review outside the confines of the APA. *Ibid.* Yet

the time, cost, and inconvenience of APA review do not depend on whether the Federal Rules of Civil Procedure govern the subpoenas in question. *Exxon*'s case against APA review applies with at least as much force here, where such review could undermine the Commonwealth's sovereign authority to administer and enforce its laws.

In *Linder*, the D.C. Circuit stressed that it had "never read the waiver contained in APA § 702 to be limited by [the deferential standard of review set forth in] APA § 706." 251 F.3d at 181. Instead, it applied "the ordinary standard of review to determine whether a district court properly considered the motion to compel production." *Ibid.* Although Federal Rule of Civil Procedure 45 provided the relevant standard in that particular case, the D.C. Circuit did not confine its reading of APA § 702's waiver of sovereign immunity only to such cases. *Linder* thus supports the proposition that a suit, like this one, that relies on APA § 702's waiver is not necessarily subject to APA § 706's deferential standard of review. Respondents' attempts to dismiss *Linder* and *Exxon* as irrelevant to the present case are thus unavailing.

Moreover, any distinction between the above-described cases and this one counsels in favor of de novo nonstatutory review, not against it. *Exxon* and *Linder* involved attempts by private parties to access information relevant to their private litigation efforts. Here, in contrast, the party seeking the information is a sovereign government trying to administer and enforce its criminal laws. The constitutional and

policy arguments favoring de novo review are thus much stronger. Of course, the Commonwealth's right of access to that information is subject to judicially enforced doctrines like the law enforcement privilege. There is no basis, however, for subjecting it to the discretion of a federal agency. Deferring to an agency's nondisclosure decision in a context like this would surely deprive the Commonwealth of any "meaningful and adequate opportunity for judicial review." *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 43 (1991).

3. Certiorari Is Warranted to Clarify the Scope and Application of the Law Enforcement Privilege.

Respondents' claim (BIO 10) that the Commonwealth seeks "unconstrained power to investigate the operations of the federal government" is an extreme and unfounded mischaracterization of the Commonwealth's position. To the contrary, the Commonwealth has filed this proceeding in federal court in recognition of the fact that the federal judiciary has the power to determine whether the Commonwealth shall receive all or any part of the information and materials it seeks. That determination, the Commonwealth further recognizes, is constrained by federal law, including the law enforcement privilege where applicable. This case thus turns in substantial part upon the scope and content of the law enforcement privilege. And as described in the Petition (*see* Pet. 31-34),

that is an issue upon which the lower courts are divided.

Respondents fail to acknowledge the clear split among the lower courts over the scope of the law enforcement privilege. Some federal circuits recognize a broad privilege shielding "documents that would tend to reveal law enforcement investigative techniques or sources." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 545 (D.C. Cir. 1977). Others, including the Fifth Circuit, extend the privilege beyond the narrow confines of *Roviaro v. United States*, 353 U.S. 53 (1957), only for "information about *ongoing* criminal investigations" by the sovereign asserting the privilege. *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568 (5th Cir. 2006) (emphasis added); *see also Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) ("Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation."); *Hemstreet v. Duncan*, No. CV-07-732-ST, 2007 WL 4287602 at *3 (D. Or. Dec. 4, 2007) (noting that Judge Posner's opinion for the Seventh Circuit in *Dellwood Farms, Inc. v. Cargill*, 128 F.3d 1122 (1997), recognized a law enforcement privilege for "information held by the government for use in ongoing criminal investigations," and finding the privilege inapposite because the request for information in that case did not involve information relating to an ongoing investigation).

The split among the circuits bears directly on this case, as there is no ongoing federal investigation into the events in question. If the privilege extends

only to materials relating to ongoing criminal investigations by the sovereign asserting the privilege, then Respondents' assertion fails. If it extends further, Respondents may be able to rely on it.

Compounding the uncertainty in this area is the fact that the party seeking the information is a sovereign entity itself, with responsibility for enforcing its own criminal laws. States "are not relegated to the role of mere provinces or political corporations" in our constitutional system. *Alden v. Maine*, 527 U.S. 706, 715 (1999). Respect for their sovereign interests may well require adjusting the federal government's law enforcement privilege in this context. Deep uncertainty thus exists not only about the proper scope of the law enforcement privilege generally, but about its application to cases pitting one sovereign's law enforcement interests against another's.

Respondents appear to deny that the law enforcement privilege should operate any differently when the party seeking the information is a sovereign – unless it is the *federal* sovereign. They stress (BIO 10) that in *United States v. O'Neill*, 619 F.2d 222, 230 (3d Cir. 1980), the court saw "an anomaly in the assertion of a public interest 'privilege' *by the City* to justify withholding information *from a federal Commission* charged by Congress to investigate [certain matters] in the public interest." (Emphasis added by Respondents). It is true that the particular assertion of privilege at issue in *O'Neill* was by a local government against a federal entity. And, of course, constitutional principles of federal supremacy do not treat

federal and non-federal sovereigns equally for all purposes. *Cf.* U.S. Const. Art. VI. But it does not upset those principles to recognize that *O'Neill*'s observation applies just as well in cases where the party holding the information is a federal agency and the party seeking it is a State (or Puerto Rico). *Cf. Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 605 (S.D.N.Y. 1991) (citing *O'Neill* to stress the special considerations that applied in a case where "the party seeking discovery is a high-level *state* official seeking to enforce *state* law") (emphasis added)).

The underlying point is that applying the law enforcement privilege does not normally entail impeding *law enforcement efforts*. That can happen, though, in cases pitting one sovereign against another. In those circumstances, uncertainty about the proper scope and substance of the law enforcement privilege becomes all the more grave. Only this Court can resolve that uncertainty.

* * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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